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CASCADING CONSTITUTIONAL DEPRIVATION: THE RIGHT TO APPOINTED COUNSEL FOR MANDATORILY DETAINED IMMIGRANTS PENDING REMOVAL PROCEEDINGS

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Today, an immigrant green card holder mandatorily detained pending his removal proceedings, without bail and without counsel, due to a minor crime committed perhaps long ago, faces a dire fate. If he contests his case, he may remain incarcerated in substandard conditions for months or years. While incarcerated, he will likely be unable to acquire a lawyer, access family who might assist him, obtain key evidence, or contact witnesses. In these circumstances, he will nearly inevitably lose his deportation case and be banished abroad from work, family, and friends. The immigrant's one chance to escape these cascading events is the off-the-record Joseph *hearing challenging detention. If he wins the hearing and is released, he can then secure counsel, and if so, will likely win his case. Yet detained and most likely* pro se, *he may not even know a* Joseph *hearing exists, let alone win it, given the complex statutory analysis involved, regarding facts, witnesses, and evidence outside his reach.*

*The immigration detention system today is unique in modern American law, in providing for preventive pretrial detention without counsel pursuant to underlying proceedings without counsel—let alone proceedings so complex that result in a deprivation of liberty as severe as deportation. In this Article, I call this the cascading constitutional deprivation of wrongful detention and deportation. I argue, under modern procedural due process theories, that this cascading constitutional deprivation warrants appointed counsel, notwithstanding traditional plenary power over immigration laws. In a post-*Padilla v. Kentucky *world where criminal defenders must now advise their clients on the same issues litigated at the* Joseph

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hearing, I argue a right to appointed counsel for mandatorily detained immigrants pending removal proceedings is constitutionally viable and practically feasible.

INTRODUCTION

Immigration detention, or "immcarceration,"[1] will ensnare nearly 429,000 immigrants this year.[2] Some never should have been detained in the first place, as the decision to detain was wrong. This is particularly likely when a Department of Homeland Security ("DHS") officer decides to mandatorily detain, without bail and without counsel, an immigrant green card holder pending his removal proceedings, due to a minor crime committed perhaps long ago. The DHS officer is not a lawyer, but will have to engage in complex statutory and factual analysis of the immigration impact of a prior crime.[3]

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1. Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 43 (2010).

2. U.S. DEPARTMENT OF HOMELAND SECURITY, OFFICE OF IMMIGRATION STATISTICS, IMMIGRATION ENFORCEMENT ACTIONS: 2011 4–5 (2012), *available at* http://www.dhs.gov/sites/default/files/publications/immigration-statistics/enforcement_ar_2011.pdf.

3. *See* Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1683–84 (2011) (describing administrative process of mandatory detention determination). *See generally* Stephen H.

To make matters worse, the mandatorily detained green card holder—in legal parlance, a lawful permanent resident ("LPR")—may never have a chance to meaningfully challenge that determination with counsel. He may be detained in substandard conditions for months or years—often far more time than he served for the crime—due to massive immigration court backlogs and the absence of speedy trial protections.[4] Worse, his detention without counsel will deny him a fair chance to challenge his deportation from family, work, and property in the United States—"all that makes life worth living."[5] Once detained, and perhaps transferred to faraway facilities, he will be unable to secure counsel who might assist him, contact family members who might assist in counsel's stead, or access documents or witnesses in any event. The impact of detention and consequent lack of representation is stark. A recent New York study found that a stunning 97 percent of detained and non-represented immigrants were unsuccessful in their removal proceedings, while 74 percent of non-detained and represented immigrants successfully stayed in America.[6]

Legomsky, *The Detention of Aliens: Theories, Rules, and Discretion*, 30 U. MIAMI INTER-AM. L. REV. 531, 533–34 (1999).

I use the term "mandatorily detained immigrant" here rather than the technically accurate (but pejorative) "alien" or factually accurate (but less descriptive) "noncitizen." *Cf.* Margaret H. Taylor, *Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform*, 29 CONN. L. REV. 1647, 1648 n.2 (1997).

Additionally, in 1996, the term "deportation" was formally changed to the term "removal." *See* 8 U.S.C. § 1229a (2006); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 304(a), 110 Stat. 3009 (1996). That said, the removal of an immigrant whom has entered the United States (such as the mandatorily detained lawful permanent residents described here) is historically and colloquially known as "deportation" (as opposed to the "exclusion" of an arriving alien). Accordingly, the terms "removal" and "deportation" will be used interchangeably here, except where the distinction matters as noted.

Also, as 91 percent of immigration detainees were male as of 2009, I will default to using "he" in this Article. *See* DORA SCHRIRO, U.S. DEP'T OF HOMELAND SECURITY, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS, 6 (2009).

4. *See* LENNI B. BENSON & RUSSELL R. WHEELER, ENHANCING QUALITY AND TIMELINESS IN IMMIGRATION REMOVAL ADJUDICATION 12–17, 22–31 (2012), *available at* http://www.acus.gov/wp-content/uploads/downloads/2012/06/Enhancing-Quality-and-Timeliness-in-Immigration-Removal-Adjudication-Final-June-72012.pdf (describing immigration court backlogs); *see also* INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON IMMIGRATION IN THE UNITED STATES: DETENTION AND DUE PROCESS (2010) [hereinafter IACHR], *available at* http://www.oas.org/en/iachr/migrants/docs/pdf/Migrants2011.pdf (criticizing substandard conditions of immigration detention as violating international human rights standards); AMNESTY INTERNATIONAL USA, JAILED WITHOUT JUSTICE-IMMIGRATION DETENTION IN THE USA (2009) [hereinafter JAILED WITHOUT JUSTICE], *available at* http://www.amnestyusa.org/pdfs/JailedWithoutJustice.pdf (similarly criticizing detention conditions).

5. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

6. New York Immigrant Representation Study, *Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings*, 33 CARDOZO L. REV. 357, 363–64 (2011) [hereinafter NYIRS].

The mandatorily detained immigrant's one chance, legally and practically, to change this course of events lies at a *Joseph* hearing. In a *Joseph* hearing, held before an immigration judge, he can challenge the DHS officer's basis for his mandatory detention and deportability, gain eligibility for bail, and, if released, have an opportunity to secure counsel and likely win his case.[7] Yet the *Joseph* hearing process, as structured today, is unlikely to prevent a wrongful detention and deportation.[8] At the outset, the detained immigrant must know to ask for a *Joseph* hearing, since DHS currently misinforms him that no available hearing exists.[9] If he receives one, to win, he must argue *pro se* against trained government counsel without access to key documents, witnesses, or law books. He must grapple with federal immigration law issues so legally and factually complicated that Justice Alito called it "unrealistic" for criminal defense lawyers to advise on them,[10] let alone *pro se* detained immigrants to litigate them. And if he loses the *Joseph* hearing, he must argue the same issues again at his deportation hearing, with the same constraints, and usually the same result.[11] No wonder a recent conference on immigration detention was entitled "imprisoned, forgotten, and deported."[12] Approximately over 8,000 mandatorily detained green card holders may attempt to navigate this process this year.[13]

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7. *See id.*; *see also* Joseph, 22 I. & N. Dec. 799 (B.I.A. 1999).

8. *See* Daniel Kanstroom, *The Right to Deportation Counsel in* Padilla v. Kentucky: *The Challenging Construction of the Fifth-and-a-Half Amendment*, 58 UCLA L. REV. 1461, 1474 (2011) (calling "wrongful deportations (that is, deportations based on mistakes of fact or law) ... among the most shameful legal phenomena of our time"); Legomsky, *supra* note 3, at 542. Wrongful detention, I argue, exacerbates this phenomenon.

9. *See infra* note 119.

10. Padilla v. Kentucky, 130 S. Ct. 1473, 1487 (2010) (Alito, J., concurring).

11. A detainee who wins his *Joseph* hearing will likely win his underlying deportation case because the legal issues are in most instances the same. *See infra* Section I.C.

12. *See* Loyola University, New Orleans, *Imprisoned, Forgotten, and Deported: Immigration Detention, Advocacy, and the Faith Community*, CENTER FOR LATIN AMERICAN STUDIES, UNIVERSITY OF FLORIDA, http://www.latam.ufl.edu/News/events.stm (last visited Oct. 1, 2012).

13. These estimations derive from a recent report finding that 9 percent of New Yorkers that ICE arrests and detains are mandatorily detained pre-removal hearing, and that 21.2 percent of New York-area detainees are LPRs. NYU SCHOOL OF LAW IMMIGRANT RIGHTS CLINIC ET AL., INSECURE COMMUNITIES, DEVASTATED FAMILIES: NEW DATA ON IMMIGRANT DETENTION AND DEPORTATION PRACTICES IN NEW YORK CITY 7, 10 (2012), [hereinafter INSECURE COMMUNITIES], *available at* http://immigrantdefenseproject.org/wp-content/uploads/2012/07/NYC-FOIA-Report-2012-FINAL.pdf. Extrapolating the New York-area statistics onto national data, I estimate that ICE mandatorily detains 38,610 each year, 8,185 (21.2 percent) of those being LPRs.

Estimation is necessary because ICE does not publicly release information on its numbers of mandatory pre-hearing detainees or LPRs; it may not even track these numbers. DONALD KERWIN & SERENA YI-YING LI, MIGRATION POLICY INSTITUTE, IMMIGRATION DETENTION: CAN ICE MEET ITS LEGAL IMPERATIVES AND CASE MANAGEMENT RESPONSIBILITIES? 25–31 (2009) *available at*

In this Article, I argue that current constitutional due process doctrine dictates the appointment of counsel to mandatorily detained LPRs to challenge detention at their *Joseph* hearings. The argument centers on what I call the "cascading constitutional deprivation" of pretrial immigration detention without counsel. This cascading deprivation, although potentially cognizable elsewhere, goes beyond the traditionally-recognized loss of liberty from detention and includes detention's resultant impact on the fundamental fairness of the underlying proceeding.[14]

This cascading deprivation is strongest in immigration removal proceedings. Procedurally, immigration removal proceedings uniquely provide for preventive pretrial detention without counsel pursuant to underlying proceedings without counsel. Substantively, the underlying deportation proceedings result in harsh deprivation themselves. Indeed, outside of criminal law, as Nora Demleitner put it, "[o]nly deportation" is likely to rise to the same level of deprivation of liberty as detention.[15] Moreover, if counsel is to be provided in removal proceedings, the arguments for it are strongest at the *Joseph* hearing challenging detention. Access to counsel at that point could both avoid the most constitutional harm to the detainee and provide the most efficiency benefits to the Government.[16]

These arguments for appointed counsel to mandatory pre-hearing LPR immigration detainees build on suggestions by David Cole and others.[17] These arguments also holistically draw on prior arguments relating to the individual components of mandatory detention and deportation. These include recent arguments by scholars examining appointed counsel

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http://www.migrationpolicy.org/pubs/detentionreportSept1009.pdf (recommending that ICE detention data systems track mandatory detainees under different statutory authorities, as well as LPR status and potential citizenship).

14. *See* Michael Kaufman, Note, *Detention, Due Process, and the Right to Counsel in Removal Proceedings*, 4 STAN. J. C.R. & C.L. 113, 117 (2008) (noting two "distinct, but complementary arguments" for appointed counsel for immigration detainees).

15. Nora V. Demleitner, *Abusing State Power or Controlling Risk?: Sex Offender Commitment and Sicherungverwahrung*, 30 FORDHAM URB. L.J. 1621, 1668 n.332 (2003) (citing Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Law and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1938–43 (2000)); *see Padilla*, 130 S. Ct. at 1481, 1484 n.11 (deportation is a particularly severe "penalty" akin to "banishment or exile") (citations omitted). *See generally* Peter L. Markowitz, *Deportation is Different*, 13 U. PA. J. CONST. L. 1299 (2011).

16. *See infra* Section III.C.2.

17. *See* David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CAL. L. REV. 693, 719 (2009) (arguing that statute modeled on federal Bail Reform Act should govern preventive immigration detention); Faiza W. Sayed, Note, *Challenging Detention: Why Immigrant Detainees Receive Less Process than "Enemy Combatants" and Why They Deserve More*, 111 COLUM. L. REV. 1833, 1874 (2011) (suggesting that mandatorily detained aliens who request a *Joseph* hearing should be provided counsel).

and immigration detention generally,[18] which have emerged since the development in the late 1980s and 1990s of mandatory immigration detention statutes like the one discussed here.[19] These also include arguments in other preventive detention contexts,[20] including criminal pretrial bail hearings;[21] arguments in civil proceedings where liberty is at stake,[22]

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18. Kaufman, *supra* note 14 (examining impact of detention on right-to-counsel arguments); *see also* LaJuana Davis, *Reconsidering Remedies for Ensuring Competent Representation in Removal Proceedings*, 58 DRAKE L. REV. 123, 154–55 (2009) (arguing for appointed counsel for detained immigrants under "quasi-criminal" analysis). Media and advocacy organizations have also recently argued for appointed counsel to immigration detainees. THE CONSTITUTION PROJECT, RECOMMENDATIONS FOR REFORMING OUR IMMIGRATION DETENTION SYSTEM AND PROMOTING ACCESS TO COUNSEL IN IMMIGRATION PROCEEDINGS, 8 (2009) (calling for appointed counsel as an "aspirational goal"); Editorial, *Immigrant detainees deserve lawyers*, L.A. TIMES, Nov. 8, 2011, http://www.latimes.com/news/opinion/opinionla/la-ed-counsel-20111108,0,2305323.story; New York City Bar, *Report on the Right to Counsel for Detained Individuals in Removal Proceedings* (Nov. 2, 2009), http://www2.nycbar.org/citybarjusticecenter/news-a-media/press-releases/127-nyc-bar-association-calls-for-right-to-counsel-for-immigrant-detainees.

19. The explosion in detention is commonly traced to multiple laws during this time period drastically broadening the use of mandatory detention without eligibility for bond. *See* Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 HARV. C.R.-C.L. L. REV. 601, 609–13 (2010). In 1988, Congress enacted mandatory pre-hearing detention without bond for those noncitizens convicted of an "aggravated felony." Anti-Drug Abuse Act, Pub. L. No. 100-690, 102 Stat. 4181 (1988). The Act defined "aggravated felony" to include murder, drug trafficking, and firearms trafficking, which further triggered mandatory detention. *Id.* §§ 7342, 7343(a)(4). In 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA) provided for mandatory detention for immigrants convicted of multiple crimes involving moral turpitude, controlled substances offenses, firearms offenses, and certain national security-related offenses. 8 U.S.C. § 1226(c)(1) (2006); Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, § 440, 110 Stat. 1214, 1277 (1996). The same year, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) expanded the definition of "aggravated felony" to encompass again more types of crimes and subjected other categories of immigrants with convictions to mandatory pre-hearing detention. Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, § 321, 110 Stat. 3009-627 (1996). Congress then codified these provisions at 8 U.S.C. § 1226(c). Increased post-9/11 immigration enforcement of these laws has also increased detention. Kalhan, *supra* note 1, at 42, 44.

Before these laws, the old Immigration and Naturalization Service ("INS"), similar to the criminal system, had historically released someone pending a deportation hearing on recognizance, or set bond, which the immigrant could then ask an immigration judge to lower. *See* Lenni B. Benson, *As Old as the Hills: Detention and Immigration*, 5 INTERCULTURAL HUM. RTS. L. REV. 11, 39–40 (2010).

20. *See* Cole, *supra* note 17; Adam Klein & Benjamin Wittes, *Preventive Detention in American Theory and Practice*, 2 HARV. NAT'L SEC. J. 85, 145–52, 189 (2011) (describing a trend of U.S. preventive detention statutes towards "developing more rigorous due process protections to guarantee that [the law] does not authorize more detention than is truly necessary").

21. Douglas L. Colbert, *Thirty-Five Years After* Gideon: *The Illusory Right to Counsel at Bail Proceedings*, 1998 U. ILL. L. REV. 1, 17–20 (1998) (arguing for constitutional right to counsel at bail hearing).

and arguments for counsel in immigration deportation proceedings (leaving aside the impact of detention).[23]

The analysis in this Article follows the familiar three-part procedural due process framework of *Mathews v. Eldridge*, which balances (1) the individual's private interest at stake, (2) the risk of an erroneous deprivation of the interest (as well as the probable value of additional or different procedural safeguards), and (3) the government's interest in using current, rather than additional or different, procedures.[24] I briefly set out here overarching doctrinal concerns, before proceeding with analysis in the bulk of the Article.

First, I argue to provide a subclass of noncitizens, mandatory pre-hearing LPR immigration detainees, a constitutional right that U.S. citizen criminal defendants lack: the right to appointed counsel at the

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22. *In re* Gault, 387 U.S. 1 (1967) (mandating appointed counsel for juvenile commitment hearings); Vitek v. Jones, 445 U.S. 480 (1980) (requiring appointed counsel or social worker for psychiatric commitment hearing); Turner v. Rogers, 131 S. Ct. 2507, 2517–20 (2011) (requiring alternative procedural safeguards to counsel for civil contemnors).

23. Currently, there exists only a case-by-case right to appointed counsel in deportation proceedings. *See, e.g.*, Aguilera-Enriquez v. INS, 516 F.2d 565, 568 (6th Cir. 1975). That said, academics have intermittently argued for the right. *See* Donald Kerwin, *Revisiting the Need for Appointed Counsel*, 4 MPI INSIGHT 1 (2005); David A. Robertson, *An Opportunity to Be Heard: The Right to Counsel in a Deportation Hearing*, 63 WASH. L. REV. 1019, 1040 (1988); Mark T. Fennell, Note, *Preserving Process in the Wake of Policy: The Need for Appointed Counsel in Immigration Removal Proceedings*, 23 ND J.L. ETHICS & PUB. POL'Y 261 (2009); Beth J. Werlin, Note, *Renewing the Call: Immigrants' Right to Appointed Counsel in Deportation Proceedings*, 20 B.C. THIRD WORLD L.J. 393 (2000); *see also* Robert S. Catz & Nancy Lee Frank, *The Right to Appointed Counsel in Quasi-Criminal Cases: Towards an Effective Assistance of Counsel Standard*, 19 HARV. C.R.-C.L. L. REV. 397 (1984); Charles Gordon, *Right to Counsel in Immigration Proceedings*, 45 MINN. L. REV. 875 (1961); William Haney, *Deportation and the Right to Counsel*, 11 HARV. INT'L L.J. 177 (1970).

24. 424 U.S. 319, 335 (1976).

This Article will assume that *Mathews* analysis applies to deportation proceedings and the detention hearing pursuant to them, as it would to any civil case, because courts today are most likely to apply that test. That said, Daniel Kanstroom and Peter Markowitz recently argued, after *Padilla v. Kentucky*'s holding that deportation is "uniquely difficult to classify" as a direct or collateral consequence of a criminal conviction, that a stricter constitutional test than *Mathews* balancing should govern deportation. Padilla v. Kentucky, 130 S. Ct. 1473, 1482 (2010). For example, Kanstroom argued that deportation proceedings should conform to a stricter test that approaches the criminal system's low tolerance for error. Kanstroom, *supra* note 8, at 1475. Peter Markowitz similarly argued for a "hard floor" framework, with rights provided to all regardless of cost, at least for some deportation proceedings (perhaps those involving detention). Markowitz, *supra* note 15, at 1307, 1352–53, 1357–60 (characterizing Sixth Amendment right to appointed counsel as a "hard floor," and raising question of whether detainees warrant a similar "hard floor" right). These arguments will be the subject of future research.

hearing challenging their pretrial detention.[25] However, the discrepancy is of more expressive validity than doctrinal.[26]

My arguments here build upon scholars' arguments first made in the middle of the twentieth century that criminal pretrial detention has a similar cascading impact on trial rights that warrants appointed counsel.[27] Those arguments were largely mooted by two developments: (1) *Gideon v. Wainwright*, which in 1963 constitutionally provided criminal defendants appointed counsel at trial,[28] and its progeny expanding that right to all critical stages;[29] and (2) the subsequent, and increasingly frequent, statutory provision of counsel at criminal bail hearings, which rendered constitutional arguments unnecessary in those jurisdictions.[30] Functionally, a criminal defendant facing jail time today in most jurisdictions will receive counsel at some point, usually earlier rather than later.

Such is not the case in immigration proceedings, where a pretrial detainee will *never* receive counsel. The risk and severity of the cascading constitutional deprivation is worse. In essence, I argue to harmonize Fifth Amendment due process applied to mandatory detention hearings with academics' initial, pre-*Gideon* conception of the Fifth and Sixth Amendments applied to criminal pretrial proceedings. Although some arguments here would support a yet-to-be-found parallel constitutional right at a bail hearing,[31] nothing requires Fifth Amendment due process rights to follow Sixth Amendment rights in lockstep.[32]

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25. *See* Rothgery v. Gillespie Cnty., 554 U.S. 191, 235 (2008) (Thomas, J., dissenting) (Court has not found a constitutional right to appointed counsel at a criminal bail hearing).

26. *See infra* Section III.C.

27. *See infra* Section III.A.

28. 372 U.S. 335, 342–45 (1963).

29. The Sixth Amendment right to appointed counsel attaches once adversary judicial proceedings have been initiated against the defendant, and applies at any critical stage before trial. United States v. Gouveia, 467 U.S. 180, 187–89 (1984). *See generally* Kanstroom, *supra* note 8, at 1470 n.46.

30. *See* 18 U.S.C. § 3142(f) (2006) (federal system provides counsel at bail hearing); FED. R. CRIM. P. 44; Douglas L. Colbert, *Prosecution Without Representation*, 59 BUFF. L. REV. 333, 341-42, 386, 389 (2011) (summarizing states and localities that statutorily provide counsel at a bail hearing). Similarly, the trend in other preventive detention systems is to statutorily provide counsel. *See* 18 U.S.C. § 4247(d) (2006) (covering appointed counsel in federal sexually violent predator commitment hearings); NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2012, H.R. REP. NO. 112-329, at 269–270 (2012) (Conf. Rep.), *available at* http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt329/pdf/CRPT-112hrpt329-pt1.pdf (providing military appointed counsel in military hearings to, *inter alia*, those who "substantially supported" Al Qaeda). *See generally* Klein & Wittes, *supra* note 20.

31. Colbert, *supra* note 30, at 341–42 (noting that *Rothgery* supports right to counsel at a bail hearing).

32. Indeed, Fifth Amendment due process rights arguably encompass a broader range of circumstances than Sixth Amendment rights. Sixth Amendment rights, although more established, traditionally only protect the defendant's interest at trial and not pretrial deprivation of liberty per se (although that assumption is increasingly in question). *See*

Moreover, other factors specific to immigration proceedings exacerbate the risk of wrongful detention and deportation without counsel. The complexity of immigration proceedings (particularly mandatory detention hearings), the asymmetry of trained government counsel on the other side, and the particular vulnerabilities of a detained foreign population all make it difficult for a *pro se* detainee to be meaningfully heard.

Further, the government has recently exacerbated this complexity by incorporating increasingly formal, trial-type evidentiary inquiries to raise its own lawyers' chances of detaining and deporting immigrants. *Joseph* hearings (and deportation hearings) now go beyond "categorical analysis" of the record of conviction and turn upon "any additional evidence or factfinding" the immigration court deems necessary.[33] The law-lawyers' advocacy skills that *Gideon* identified are correspondingly even more crucial.

Moreover, this voluntary complexity belies any government arguments based on the efficiency or cost savings that "informal" adjudication procedures provide.[34] Indeed, if the government can now provide appointed counsel in wartime detention proceedings, it can provide appointed counsel in peacetime immigration proceedings.[35] The costs of appointed counsel would likely be de minimis compared to the costs of detention, and the provision of counsel early in the case might well further efficiency by resolving cases more quickly, reducing detention, and reducing court backlogs. The government also possesses a non-quantifiable interest in providing counsel—namely, ensuring the public legitimacy of its system of detaining lawful residents with significant community ties.[36]

Most likely, the strongest argument against appointed counsel is not that *Mathews* balancing disfavors it, but rather, that procedural due process plays little if any role at all. Plenary power doctrine provides that Congress and the executive branch have broad, and often exclusive, authority to regulate immigration matters incidental to national sovereignty. Courts

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supra note 29; *infra* Section III.A.1 & note 289. Conversely, Fifth Amendment due process, with a touchstone of "fundamental fairness," is famously flexible and adaptable to new facts and circumstances. Jason Parkin, *Adaptable Due Process*, 160 U. PA. L. REV. 1309, 1311 (2011).

33. Silva-Trevino, 24 I. & N. Dec. 687, 708 (A.G. 2008), *rejected by* Prudencio v. Holder 699 F.3d 472 (4th Cir. 2012).

34. Mathews v. Eldridge, 424 U.S. 319, 335 (1976); Das, *supra* note 3, at 1730–32; *see infra* Section III.C.1.

35. NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2012, H.R. REP. NO. 112–329, at 269–270 (2012) (Conf. Rep.), *available at* http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt329/pdf/CRPT-112hrpt329-pt1.pdf.

36. *Cf.* Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1731 (2009) (arguing that immigration law sanctions scheme should reflect benefit to United States of admitting LPRs and likelihood that LPRs will acquire ties to U.S. residents and communities).

exercise deferential constitutional review.[37] However, courts have carved out procedural due process exceptions to plenary power as they applied the modern procedural due process revolution to immigration law.[38] In doing so, courts have recognized two principles relevant here: (1) that LPRs have cognizable liberty interests, owing to their years of residency, work, and family ties in America;[39] and (2) when their liberty interests are deprived by detention, procedural due process imposes constitutional constraints.[40]

Thus, I accept for this Article the holding of *Demore v. Kim*, which, citing plenary power principles, upheld as a matter of *substantive* due process the mandatory pre-hearing immigration detention without bail discussed here.[41] Here, I argue that *procedural* due process dictates appointed counsel so the mandatory detainee may meaningfully defend himself at the *Joseph* hearing, which *Demore* explicitly did not address.[42]

This Article has four Parts. Part I provides an overview of the practical inability of an immigrant mandatorily detained pre-hearing to challenge his detention and deportation. Part II articulates the doctrinal arguments for procedural due process-derived exceptions to plenary immigration power. Part III argues that under *Mathews v. Eldridge*, procedural due process requires appointed counsel at a *Joseph* hearing.[43] Finally, Part IV proposes procedures for appointed counsel, proposes an Immigrant Detention Defender Corps, and rejects alternative procedural safeguards to full representation. Theoretically, "unbundled" representation at the *Joseph* hearing is possible, as the right to counsel articulated here turns on the right to challenge detention. However, because other procedural infirmities currently result in continued detention of even those who win Joseph hearings, the cascading impact of detention on their hearing rights

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37. *See* T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862, 870 (1989).

38. Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992).

39. Demore v. Kim, 538 U.S. 510, 543–47 (2003) (Souter, J., dissenting) (U.S. immigration law "goes out of its way to encourage" economic, familial, and social ties for LPRs "indistinguishable from those of a citizen," and thus, due process applies to LPRs) (citing Landon v. Plasencia, 459 U.S. 21, 33 (1982) (noting that LPRs possess liberty interests)).

40. Motomura, *supra* note 38, at 1655–56.

41. *Demore*, 538 U.S. at 521 ("Congress may make rules as to aliens that would be unacceptable if applied to citizens.") (quoting Mathews v. Diaz, 426 U.S. 67, 79–80 (1976)).

42. *Demore* did not analyze the procedural due process required at a *Joseph* hearing because petitioner Kim never requested one. *See Demore*, 538 U.S. at 514 n.3 ("[W]e have no occasion to review the adequacy of *Joseph* hearings generally . . . .") (citing Joseph, 22 I. & N. Dec. 799 (B.I.A. 1999)); *id.* at 531 (Kennedy, J., concurring) ("[D]ue process requires individualized procedures to ensure there is at least some merit to the Immigration and Naturalization Service's (INS) charge and, therefore, sufficient justification to detain a lawful permanent resident alien pending a more formal hearing.").

43. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

may make unbundled representation constitutionally infeasible in the current system.

Finally, this Article attempts to shift the debate regarding appointed counsel in immigration proceedings from the politically viable to the constitutionally viable. Most recent scholarship (and some litigation) regarding appointed counsel in immigration proceedings has focused on politically sympathetic immigrants: asylum seekers,[44] the mentally disabled,[45] and juveniles.[46] Although immigrants with criminal convictions are politically stigmatized,[47] pre-hearing mandatory detainees, I argue, currently possess the most substantively viable constitutional arguments for appointed counsel of any sub-class of immigrants in proceedings.

I. MANDATORY DETENTION PENDING REMOVAL PROCEEDINGS: AN OVERVIEW

This section will outline the landscape facing a mandatorily detained immigrant who seeks to challenge his detention *pro se*. It will explore the practical constraints of detention without representation, the immense court backlogs that impose a *de facto* incarcerative sentence on those who contest deportation, the procedural infirmities of the mandatory detention process, and the legal and factual complexities of the *Joseph* challenge and ultimate deportation hearing. In sum, these procedures are a recipe for wrongful detention and deportation.[48]

The wealth of recent empirical evidence compiled by governmental, advocacy, and human rights organizations allows for a fuller constitutional

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44. *See* John R. Mills, Kristen M. Echemendia & Stephen Yale-Loehr, *"Death Is Different" and a Refugee's Right to Counsel*, 42 CORNELL INT'L L.J. 361, 363 (2009); Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 340 (2007).

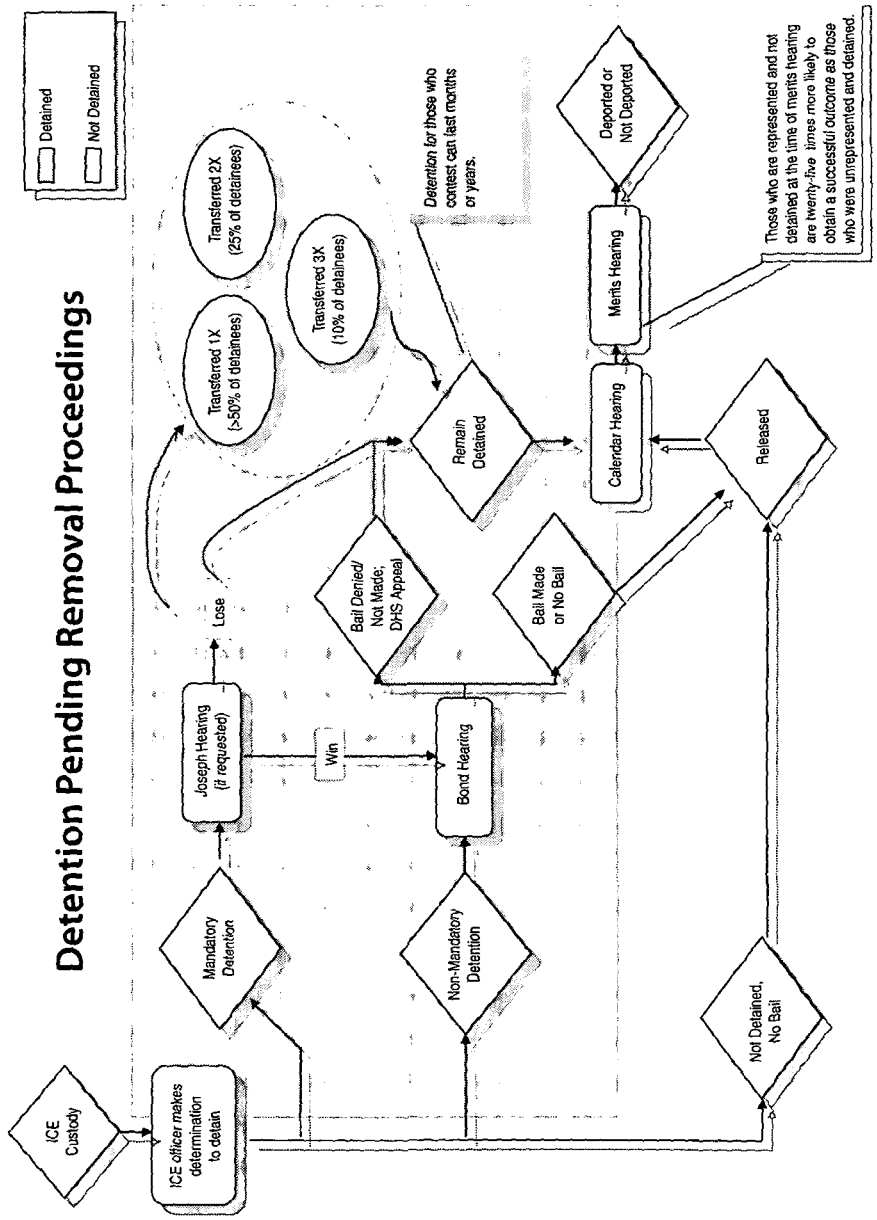
45. *See, e.g.*, Franco-Gonzalez v. Napolitano, No. 10-02211, 9–10, 17–18, 22 (C.D. Cal. Nov. 21, 2011) (order certifying class of mentally disabled immigration detainees seeking, *inter alia*, appointed counsel in their immigration proceedings); *see also* Alice Clapman, *Hearing Difficult Voices, the Due-Process Rights of Mentally Disabled Individuals in Removal Proceedings*, 45 NEW ENG. L. REV. 373 (2011).

46. *See, e.g.*, Devon A. Corneal, *On the Way to Grandmother's House: Is U.S. Immigration Policy More Dangerous than the Big Bad Wolf for Unaccompanied Juvenile Aliens?*, 109 PENN ST. L. REV. 609 (2004); Linda Kelly Hill, *The Right to Be Heard: Voicing the Due Process Right to Counsel for Unaccompanied Alien Children*, 31 B.C. THIRD WORLD L.J. 41 (2011); David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979 (2002).

47. *See* Markowitz, *supra* note 15, at 1357 (noting that criminal aliens are a group that "garners almost unrivaled political disfavor").

48. As Daniel Kanstroom notes, even a 1 percent error rate in deportations, "which would be a rather positive accomplishment for" DHS, would equal 80,000 to 100,000 mistakes over the past few years, including thousands of LPRs. Kanstroom, *supra* note 8, at 1475.

assessment of the impact of detention without counsel.[49] That said, the empirical evidence only confirms our intuitions that detention creates barriers to accessing counsel, and detention without counsel in turn impacts the outcome of deportation proceedings.[50]



49. *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 29–30 n.5 (1981) (considering statistics regarding erroneous deprivation of counsel).

50. NYIRS, *supra* note 6, at 360–61.

A. *Mandatory Detention's Deprivation of Liberty and Impact on Lack of Representation*

1. Lack of Representation, Access to Representation, or Legal Information

The recent study led by Second Circuit Judge Robert Katzmann described an "immigrant representation crisis" in removal proceedings.[51] The crisis particularly affects detainees. Put simply, most detainees are unable to secure adequate legal assistance.[52] In 2009, nearly two-thirds of detainees in removal proceedings were unrepresented.[53] Even in New York, where there are many immigration attorneys, 60 percent of detainees lack counsel by the time their cases are completed (as compared to 27 percent of non-detained immigrants).[54]

Few lawyers have the resources to assist detainees because of the additional communication time, the complexity of cases involving criminal convictions, and the possibility of transfer forcing counsel to continue representation in a far-flung representation.[55] This is particularly true for pro bono organizations, which must triage their limited resources.[56] Unfortunately, many immigrant detainees are indigent, and for them, pro bono counsel is their only choice.[57]

ICE's pattern of transferring detainees from urban areas such as New York or Los Angeles, near where immigrants live, to facilities in Louisiana, Texas, or Arizona underserved by lawyers has exacerbated the representation crisis for detainees.[58] Although transfers in the criminal system are limited by the Sixth Amendment right to face trial in the jurisdiction where a crime occurred, ICE has staunchly opposed any limits to its

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51. *Id.* at 358.

52. *Id.* at 363 ("The greatest area of need for indigent removal defense is . . . for detained individuals.").

53. CONSTITUTION PROJECT, *supra* note 18, at 2. In 2010, an ABA study spanning all immigration proceedings found 84 percent of detainees unrepresented. AMERICAN BAR ASS'N, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES 5–8 (2010), *available at* http://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report.authcheckdam.pdf.

54. NYIRS, *supra* note 6, at 372.

55. *Id.* at 387–88, 396–97, 400–01, 404 n.106. Accordingly, only 33 percent of detainees with cases in New York had counsel, as compared to 79 percent of nondetainees.

56. *Id.* at 387–88.

57. Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, a Case Study*, 78 FORDHAM L. REV. 541, 548 (2009) (surveying population of those in deportation proceedings and arguing that "many respondents simply lack the financial resources to hire private counsel").

58. SCHRIRO, *supra* note 3, at 8.

transfer power.[59] Transfers of detainees recently tripled between 2004 and 2009.[60] In 2009, 52 percent of detainees were transferred at least once.[61] Multiple transfers are common as well. From 1998 to 2010, over 46 percent of transferred detainees were moved at least twice, with 3,400 detainees transferred ten times or more.[62] Worse, detainees are most often transferred to facilities nearest the least amount of lawyers, such as Louisiana, with over 500 detainees for every immigration lawyer.[63] Unsurprisingly, transferred detainees are less likely to be successful at their removal hearing.[64]

All in all, mandatory detainees with complex yet viable claims, yet detained faraway from documents and evidence—those "most in need of counsel to help them make their case"—are least able to secure it.[65]

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59. HUMAN RIGHTS WATCH, LOCKED UP FAR AWAY: THE TRANSFER OF IMMIGRANTS TO REMOTE DETENTION CENTERS IN THE UNITED STATES 3, 6 (2009).

On January 4, 2012, ICE released new policy guidance regarding detainee transfers. An immigration officer is now required to obtain approval to transfer a detainee with immediate family, an attorney of record, or pending proceedings nearby. However, the exceptions to the requirement are extremely broad; for example, exceptions include "reliev[ing] or prevent[ing] facility overcrowding," or "transfer to a more appropriate detention facility based on the detainee's individual circumstances and risk factors." *See* U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, POLICY 11022.1: DETAINEE TRANSFERS § 5.2(3) (2012), *available at* http://www.ice.gov/doclib/detention-reform/pdf/hd-detainee-transfers.pdf. The policies may also encourage quick transfer before a detainee secures an attorney. The impact of the guidance remains unclear. *See* César Cuauhtémoc García Hernández, *ICE's New Prisoner Transfer Policy: Something Old, Something New*, CRIMMIGRATION (May 15, 2012, 4:00 AM), http://crimmigration.com/2012/05/15/ices-new-prisoner-transfer-policy-something-old-something-new.aspx.

60. HUMAN RIGHTS WATCH, A COSTLY MOVE: FAR AND FREQUENT TRANSFERS IMPEDE HEARINGS FOR IMMIGRANT DETAINEES IN THE UNITED STATES 1 (2011).

61. *Id.*

62. *Id.*

63. *Id.* at 2. The Fifth Circuit received 483,457 transfers from 1998–2010. *Id.* at 22. The Ninth Circuit received the most transfers (760,606) and had the second-worst ratio (284 to 1). *Id.* at 23. In 2010, 80 percent of detainees were in severely underserved facilities, with more than one hundred detainees for every full-time NGO attorney. NATIONAL IMMIGRANT JUSTICE CENTER, ISOLATED IN DETENTION: LIMITED ACCESS TO LEGAL COUNSEL IN IMMIGRATION DETENTION FACILITIES JEOPARDIZES A FAIR DAY IN COURT 4 (2010) [hereinafter ISOLATED IN DETENTION].

64. A national study found that 74 percent of transferred detainees ultimately were deported, compared to 54 percent of detainees never transferred. HUMAN RIGHTS WATCH, *supra* note 60, at 22. A New York-area study found that 94.5 percent of those transferred outside the New York and New Jersey area were deported. INSECURE COMMUNITIES, *supra* note 13, at 16. For these reasons, scholars have argued that transfer alone violates the due process right to appointed counsel. César Cuauhtémoc García Hernández, *Due Process and Immigrant Detainee Prison Transfers: Moving LPRs to Isolated Prisons Violates Their Right to Counsel*, 21 BERKELEY LA RAZA L.J. 17 (2011).

65. NYIRS, *supra* note 6, at 387. Even if a detainee could secure a lawyer, detention imposes barriers to communication with that lawyer. In 2010, 78 percent of detainees were in facilities that prohibited scheduling private telephone calls with lawyers. ISOLATED

It is possible that a "selection effect" may exist regarding mandatory detainees' lack of representation—i.e., mandatory detainees cannot find lawyers because lawyers take "better" claims to conserve resources.[66] Indeed, many mandatory detainees are barred by law from seeking relief, and if so, their only chance is to challenge the immigration classification of their conviction.[67] That said, the New York study concluded a "causal effect" between representation and success was more likely rather than vice versa.[68] A lawyer's actions such as collecting evidence and witnesses contribute to the success of a claim.[69] Those actions, as well as a lawyer's legal and argumentative skills, are most central to a mandatory detainee's claim, as set forth in Section III.B *infra*.

If a detainee cannot secure counsel, he may have few alternatives. He may litigate his case *pro se*, forced to rely entirely on legal resources in detention, such as law libraries. Unfortunately, some detention facilities do not have law libraries. Where they exist, the materials are commonly out-

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IN DETENTION, *supra* note 63, at 4. Several facilities prohibit contact visits where detainees can exchange legal documents with counsel. IACHR, *supra* note 4, ¶ 326.

66. NYIRS, *supra* note 6, at 386–87.

67. In addition to challenging removability, some mandatorily detained aliens are eligible for certain forms of discretionary relief from removal. *See generally* Dana Leigh Marks, *A View Through the Looking Glass*, 39 FORDHAM URB. L.J. 91, 110 (2012). The most pertinent forms of available relief are cancellation of removal, see 8 U.S.C. § 1229b(a) (2006), or persecution-based grounds, such as asylum, see 8 U.S.C. § 1158 (2006), withholding of removal, see 8 U.S.C. § 1231(b)(3), or withholding or deferral of removal under the Convention against Torture, 8 C.F.R. §§ 1208.16(c), 1208.17 (2012). An "aggravated felony" disqualifies one for relief, however. Marks, *supra*, at 100 n.49; *see also* 8 U.S.C. § 1158(b)(2)(A)(ii), (B) (aggravated felony disqualifies one for asylum).

Cancellation of removal applies to a LPR convicted of a crime other than an aggravated felony if he has been a lawful permanent resident for five years, has resided continuously in the United States for seven years after having been admitted in any status, and can demonstrate that he is deserving of the favorable exercise of discretion. 8 U.S.C. § 1229b(a). A number of noncitizens also remain eligible for the more expansive predecessor to "Cancellation of Removal," 212(c) relief, as a result of the Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001) (holding that 1996 elimination of 212(c) does not apply retroactively); *see also* Immigration and Nationality Act (INA) § 212(h), 8 U.S.C. § 1182(h) (2006). Voluntary departure also is considered a form of relief, albeit typically not considered a successful outcome, in that the LPR must leave the United States. Marks, *supra*, at 111. *See generally* Kaufman, *supra* note 14, at 119.

Generally, this Article will focus on challenges to removability, since those issues are litigated at the *Joseph* hearing, and the constitutional impact of infringement on available discretionary relief is less clear. *See* Kanstroom, *supra* note 8, at 1508–09 ("[O]ur understanding of discretion in deportation law is itself a complicated problem.") (citing Daniel Kanstroom, *The Better Part of Valor: The REAL ID Act, Discretion and the "Rule" of Immigration Law*, 51 N.Y.L. SCH. L. REV. 161 (2006)); Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703 (1997)).

68. NYIRS, *supra* note 6, at 387 (citing Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 340 (2007) (considering similar "selection effect" regarding asylum representation)).

69. *Id.*

dated, unrelated to immigration, and in English.[70] And, even if law libraries do exist, access to them is commonly limited as well, as requests for access often depend on the "mood of the guards."[71] Translation services are generally inadequate, especially considering that immigration detention by definition houses foreign nationals.[72] ICE is not required to provide legal materials in foreign languages.[73] Alternatively, a detainee may rely heavily on family for assistance, who might be his only source of documents or evidence. Yet *pro se* detainees face significant barriers to contact with the outside world.[74] ICE's frequent transfers of detainees to far-flung areas exacerbate detainees' isolation.[75] Some facilities entirely prohibit contact visits with family.[76] Telephone access, often detainees' primary access to the outside world, is generally limited as well.[77]

Some detention facilities, with pro bono help, have improved their provision of legal information. In 2003, the Legal Orientation Program (LOP) began, through which trained nonprofit representatives conduct legal orientations, self-help workshops, or referrals for pro bono representation.[78] EOIR currently oversees LOPs at twenty-five detention

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70. NAT'L IMMIGRATION LAW CTR., A BROKEN SYSTEM: CONFIDENTIAL REPORTS REVEAL FAILURES IN U.S. IMMIGRANT DETENTION CENTERS 33 (2009) [hereinafter NILC]; JAILED WITHOUT JUSTICE, *supra* note 4, at 32.

71. JAILED WITHOUT JUSTICE, *supra* note 4, at 32.

72. *Id.* at 34. The new 2011 ICE detention standards provide generally for translation, although not in connection with litigating proceedings. *See* U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, PERFORMANCE-BASED NATIONAL DETENTION STANDARDS 2011 1 (2012) [hereinafter DETENTION STANDARDS], *available at* http://www.ice.gov/detention-standards/2011/ (in several places, providing that "[a]ll written materials provided to detainees shall generally be translated into Spanish," and "[w]here practicable, provisions for written translation shall be made for other significant segments of the population"); *see also id.* at 240 ("Facilities shall provide appropriate interpretation and language services for [limited English proficient] detainees related to medical and mental health care."); *id.* at 336 (requiring translation services in grievance process). It is unclear whether these goals have been realized in practice.

73. The new ICE detention standards provide that limited-English detainees who "indicate difficulty with the legal materials must be provided assistance beyond access to a set of English-language law books." However, this assistance is only "to the extent practicable" (e.g., "helping the detainee obtain assistance from other detainees," and assisting in contacting pro bono organizations). DETENTION STANDARDS, *supra* note 72, at 346.

74. *See* Markowitz, *supra* note 57, at 559.

75. *Id.* at 556–58.

76. NILC, *supra* note 70, at 15 & n.23; *see also* IACHR, *supra* note 4, ¶¶ 327, 330.

77. Many centers have only two or three phones available for as many as forty to fifty detainees. JAILED WITHOUT JUSTICE, *supra* note 4, at 35. Several facilities inappropriately required detainees to pay for calls to government offices, such as to obtain documents. NILC, *supra* note 70, at 27.

78. U.S. DEP'T OF JUSTICE, FACT SHEET: EOIR'S LEGAL ORIENTATION AND PRO BONO PROGRAM 1 (2010), *available at* http://www.justice.gov/eoir/press/2010/LegalOrientProBonoFactSheet012710.pdf.

facilities,[79] although over half of detention facilities still offer no "know-your-rights" program.[80]

In any event, the substandard conditions of detention further exacerbate the difficulty of litigating *pro se*.[81] The mental and physical anguish of prolonged detention also can impact the ability to meaningfully litigate.[82]

2. Length of Confinement Due to Court Backlogs

I address here the length of confinement that pre-hearing mandatory detainees experience to make two points: first, that the deprivation of liberty is severe enough to be constitutionally cognizable (at least, if detainees contest their case), and relatedly, that the coercive effect of such prolonged detention encourages detainees to forego claims.

First, deprivation of liberty has traditionally possessed a temporal component under due process analysis. Detention for a year is a more severe deprivation of liberty than detention for a day, or an hour, although no bright-line exists.[83] Indeed, *Demore v. Kim* explicitly incorporated in its ruling a finding that mandatory pre-hearing detainees were on average only detained for limited times (a finding that has since been challenged).[84]

ICE has not released statistics regarding the length of time that pre-hearing mandatory detainees spend in detention.[85] However, from what is

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79. *Id.*

80. ISOLATED IN DETENTION, *supra* note 63, at 4.

81. Kaufman, *supra* note 14, at 129. Detention conditions have recently been reported as unsanitary, abusive in response to assertion of rights, and reflecting high incidence of death. *See* JAILED WITHOUT JUSTICE, *supra* note 4, at 42–43 (detainee, "after refusing to sign his deportation order without first speaking with an attorney," was handcuffed, shackled, and beaten by six officers forcefully slamming him against the wall and concrete floor); IACHR, *supra* note 4, ¶¶ 297–307 (detailing unsanitary conditions such as overcrowding, insufficient food and water, and infectious disease outbreaks); U.S. Immigration & Customs Enforcement, Detention Management Program, *List of Deaths in ICE Custody October 2003—December 19, 2011*, http://www.ice.gov/doclib/foia/reports/detaineedeaths2003-present.pdf (last visited Feb. 19, 2011) (121 ICE detainees have died since October 2003).

82. RUTGERS SCHOOL OF LAW-NEWARK IMMIGRANT RIGHTS CLINIC, FREED BUT NOT FREE: A REPORT EXAMINING THE CURRENT USE OF ALTERNATIVES TO IMMIGRATION DETENTION 3 (2012), [hereinafter FREED BUT NOT FREE], *available at* http://www.law.newark.rutgers.edu/files/FreedbutnotFree.pdf; *see also* Kaufman, *supra* note 14, at 142.

83. *See* Turner v. Rogers, 131 S. Ct. 2507, 2513 (2011) (noting that contempt statute provided for imprisonment for up to one year); Zadvydas v. Davis, 533 U.S. 678, 699–701 (2001) (defining six months as presumptively reasonable for post-removal order detention); Argersinger v. Hamlin, 407 U.S. 25, 40 (1972) (providing appointed counsel where at least six months of jail time at stake).

84. 538 U.S. 510, 529–31 (2003); *see also infra* notes 257, 259.

85. *See* KERWIN & LI, *supra* note 13 (ICE does not publicly release information on mandatory pre-hearing detainees and may not track it).

available, one can infer that a mandatorily detained immigrant today who contests his case will commonly spend months, and sometimes over a year, in detention because of enormous immigration court backlogs.[86] The average immigration case pending today has been pending for 529 days,[87] with the average case involving a criminal charge (and thus, more likely to be a detainee's) pending for 455 days.[88] While some detainees' cases resolve more quickly, it is likely because many detainees accept deportation to escape detention, regardless of the merits.[89] Regarding detainees with prior criminal convictions who do contest, their cases may take longer since they involve more complex analysis.[90] Moreover, as ICE expands its enforcement initiatives, and the use of detention increases, it is expected that court backlogs will increase with it.[91]

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86. IACHR, *supra* note 4, ¶ 103. Of the 4,170 individuals in January 2009 who had been detained for six months or longer, 57 percent were still fighting deportation, and 31 percent were detained for one year or longer. ACLU IMMIGRANTS' RIGHTS PROJECT, ISSUE BRIEF: PROLONGED IMMIGRATION DETENTION OF INDIVIDUALS WHO ARE CHALLENGING REMOVAL 4 & n.18 (2009), *available at* http://www.aclu.org/files/assets/prolonged_detention_issue_brief.pdf.

Available data, including the data cited in *Demore*, likely drastically undercounts the length of pre-hearing mandatory detention, especially in geographic areas with many immigrants. Some non-mandatory detainees are released quickly. Also, many Mexican nationals subject to expedited removal are detained and removed quickly at the border. *Id.*

Thus, Schriro's 2009 report found that a noncitizen is detained on average 30 days, with 38 percent released within a week. SCHRIRO, *supra* note 3, at 6. Less than 1 percent of all admissions, about 2,100 aliens, are detained for a year or more, and one could infer that a significant portion of those 2,100 are mandatory detainees. A separate 2009 analysis of ICE data that considered pre-removal order detainees (both non-mandatory and mandatory) confirmed their detention was longer. *See* KERWIN & LI, *supra* note 13, at 1–2 MPI, *Immigration Detention* 1–2 (average length of detention for pre-removal order detainees was 81 days, with average of 121 days for detainees with criminal convictions). Moreover, specific locations that handle high volumes of detainees report longer detention times. NYC KNOW YOUR RIGHTS PROJECT, CITY BAR JUSTICE CENTER, AN INNOVATIVE PRO BONO RESPONSE TO THE LACK OF COUNSEL FOR INDIGENT IMMIGRANT DETAINEES 19 (2009), *available at* http://www2.nycbar.org/citybarjusticecenter/images/stories/pdfs/nyc_knowyourrightsnov09.pdf (finding that 48 percent of Varick Street detainees were held for four to six months, with many up to twenty-eight months).

87. *Immigration Court Backlog Tool*, TRAC IMMIGRATION, http://trac.syr.edu/phptools/immigration/court_backlog/ (last visited Oct. 7, 2012).

88. *Id.*

89. *Demore*, 538 U.S. at 567 ("[T]he length of the average detention period in great part reflects the fact that the vast majority of cases involve aliens who raise no challenge to removability at all.").

90. BENSON & WHEELER, *supra* note 4, at 11, 30.

91. *Id.* at 30 (enforcement initiatives will likely increase detention, negatively affect representation rates, increase court inefficiency, and thus further increase backlogs); NYIRS, *supra* note 6, at 372, 404 & n.103 (ICE will prioritize deportation of immigrants with prior criminal convictions).

For mandatory detainees, their case processing time equals detention.[92] No constitutional or statutory speedy trial guarantees ameliorate this effect.[93] Indeed, their immigration detention will often be longer than time served for the original criminal disposition (if any).[94] Moreover, LPRs, with the most to lose from deportation since they have developed family and work ties, are most likely to contest deportation—yet they face a *de facto* incarcerative sentence if they do.[95]

As such, the prospect of prolonged mandatory detention coerces some detainees to give up their rights and accept deportation to escape detention.[96] In some cases, detainees accept "stipulated removal"—akin to a plea bargain—due to misleading information or coercion from ICE.[97] Jennifer Lee Koh recently argued that this procedure violates due process.[98]

B. *Procedures for Determining and Challenging Mandatory Detention*

Having set out the lack of representation, I set out here the mandatory detention process that the detainee must navigate without counsel. This section outlines the typical process for DHS' mandatory detention determination, the *Joseph* hearing challenging it, and the eventual removal hearing.[99] All are legally complex. Moreover, as things stand, the immigrant may be detained for months without any lawyer—government,

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92. Juliet Stumpf has argued that immigration detention is a part of the "punishment-by-process" that the criminal and immigration systems impose on an immigrant. *Cf.* Juliet Stumpf, *The Process is the Punishment in Crimmigration Law*, *in* THE BORDERS OF PUNISHMENT: CRIMINAL JUSTICE, CITIZENSHIP AND SOCIAL EXCLUSION (Mary Bosworth & Katja Aas, eds.) (forthcoming 2013).

93. Kalhan, *supra* note 1, at 49. Some other countries impose time limits on immigration detention. *See* OPHELIA FIELD & ALICE EDWARDS, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, ALTERNATIVES TO DETENTION OF ASYLUM SEEKERS AND REFUGEES 187 (2006), *available at* http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4472e8b84&page=search (Sweden imposes strict statutory time limits).

94. Alice Clapman, *Petty Offenses, Drastic Consequences, Toward a Sixth Amendment Right to Counsel*, 33 CARDOZO L. REV. 585, 587–88, 590–95 (2011) (explaining that many crimes that trigger mandatory detention and deportation may result in no jail time).

95. Demore v. Kim, 538 U.S. 510, 567–68 (2003) (Souter, J., concurring and dissenting).

96. Jennifer Lee Koh, *Waiving Due Process (Goodbye): Stipulated Orders of Removal and the Crisis in Immigration Adjudication*, N.C. L. REV. (forthcoming 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2039451.

97. JENNIFER LEE KOH ET AL., DEPORTATION WITHOUT DUE PROCESS iii, 2 (2011) (stating that ICE provided detainees with "inaccurate, misleading, and confusing information about the law and removal process").

98. *Id.*

99. *See supra* Figure 1, "Detention Pending Removal Proceedings."

judge, or his own—even substantively reviewing the non-lawyer officer's initial determination, let alone challenging it on his behalf.[100]

1. The Mandatory Detention Determination

The deportation process begins when ICE takes the immigrant into custody, either after an ICE arrest or an ICE detainer after a local police stop or completion of criminal incarceration.[101] An ICE officer, typically a non-lawyer, may then issue a Notice to Appear ("NTA"), which formally begins immigration removal proceedings.[102] The officer may then issue a Notice of Custody Determination (Form I-286), which formally initiates detention.[103] For the mandatorily detained, the NTA's removal charge will commonly be the Notice of Custody charge justifying mandatory detention.[104]

When this non-lawyer ICE officer issues the Notice of Custody, he conducts a threshold legal interpretation under 8 U.S.C. § 1226(c) of any prior convictions to determine whether mandatory detention is warranted.[105] The determination is made on a paper record.[106] Determinations are increasingly time-pressurized as immigration arrests increase, which may lead to more incorrect determinations.[107] Indeed, DHS processes more immigrants for detention in one year than any other detention system in America, including the federal Bureau of Prisons or any state's prison system.[108]

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100. *See infra* Section I.B.1.

101. *See* 8 C.F.R. § 287 (1966); Christopher N. Lasch, *Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers*, 35 WM. MITCHELL L. REV. 164 (2009).

102. The NTA can be issued by several DHS officials. 8 C.F.R. § 239.1(a) (2005).

103. Form I-286 issuance commonly occurs at or shortly after NTA issuance, by the same DHS officer; however, nothing requires either. 8 C.F.R. § 236.1(g)(1) (2011).

104. *See* Kotliar, 24 I. & N. Dec. 124, 127 (B.I.A. 2007) (noting that if NTA lacks basis for detention, immigrant must be given notice and opportunity to later challenge mandatory detention).

105. Heeren, *supra* note 19, at 609–11 (explaining that bond may or may not be set at officer's discretion).

106. Das, *supra* note 3, at 1684.

107. *Id.* at 1727 ("Frontline immigration officials make thousands of these assessments every day . . . ."). Das argues that these "overburdened frontline officials" are less likely to produce accurate results particularly because the immigration system has moved beyond categorical analysis. *See id.* at 1735; *see also infra* Section I.C.1.

108. SCHRIRO, *supra* note 3, at 1446.

Although this Article discusses mandatory pre-removal hearing detention under 8 U.S.C. § 1226(c) (2006), immigrants may also be mandatorily detained under other legal authorities—e.g., post-removal order, or as arriving aliens at the border. For a general overview of detention authorities, see Heeren, *supra* note 19, at 609–13.

Mandatory post-removal order detention occurs under 8 U.S.C. § 1231(a) (2006). Such a detainee is mandatorily detained for ninety days after the order of removal and, if not removed during those ninety days, may be released under supervision. 8 U.S.C.

Furthermore, DHS policy encourages officers to err on the side of detention. DHS policy generally encourages over-detention rather than under-detention, and requires detention guidelines be heeded strictly.[109] DHS currently requires mandatory detention even for non-recent convictions, although several courts have rejected DHS' interpretation.[110]

No attorney review of the mandatory detention determination is required, and it is unclear whether it occurs in practice.[111] It does appear in practice that an ICE field office attorney will review an NTA with criminal charges, but will not review the custody determination.[112] DHS policy provides that detention questions "should" be directed to local counsel, although actual practices are unclear.[113]

To the extent the NTA is reviewed, immigration judges have criticized the "failure of ICE attorneys to evaluate and reject NTAs for legal insufficiency."[114] Judges and DHS cited "a willingness to 'let the court sort it out,'" and "the possibility, however slight, that the person might later commit a brutal crime that the press and others would attribute to ICE's

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§ 1231(a)(3). Certain inadmissible or criminal aliens, or immigrants whom DHS determines to be a flight risk or danger, may continue to be detained beyond the ninety-day removal period. *Id.* § 1231(a)(6). Detention may not extend beyond a period "reasonably necessary to secure removal." *See* Zadvydas v. Davis, 533 U.S. 678, 699–701 (2001) (defining six months as presumptively reasonable); *see also* Clark v. Martinez, 543 U.S. 371, 386 (2005) (extending *Zadvydas* to inadmissible noncitizens). *See generally* Kalhan, *supra* note 1, at 46 n.29.

Additionally, noncitizens arriving in the United States—which may include returning LPRs and asylum seekers—are mandatorily detained if deemed inadmissible, without any immigration judge review. 8 U.S.C. § 1225(b)(1)(B)(iii)(IV), (b)(2)(A) (2006). They may be paroled into the United States. *Id.* § 1182(d)(5) (authorizing humanitarian parole). Additionally, such immigrants arriving from either Mexico or Canada may be deported pursuant to "expedited removal," a fast-track procedure that allows immigration officers to issue removal orders with no hearing or review by an IJ. 8 U.S.C. §§ 1225(b)(2)(c), 1229a.

109. "An alien being considered for detention should be placed in the highest numbered priority within the top category possible." *See* Memorandum from Asa Hutchinson, Undersec'y for Border and Transp. Sec., to Robert C. Bonner, Comm'r, U.S. Customs & Border Prot. 1 (Oct. 18, 2004), *available at* http://www.ice.gov/doclib/foia/dro_policy_memos/detention_prioritization_and_notice_to_appear_documentary_requirements-oct2004.pdf [hereinafter Hutchinson Memo]. Mandatory detention represents the highest category, ahead of "national security interest" aliens. *Id.* at 2.

110. *See* Louisaire v. Muller, 758 F. Supp. 2d 229, 235–38 (S.D.N.Y. 2010) (granting *habeas* to an immigrant mandatorily detained two years after seventh-degree misdemeanor drug possession charge with a three-day sentence). *But see* Gomez v. Napolitano, No. 11 Civ. 1350, 2011 U.S. Dist. LEXIS 58667, at *3 (S.D.N.Y. May 31, 2011) (deferring to agency interpretation of § 1226(c)). *See generally* NYIRS, *supra* note 6, at 373 n.35.

111. BENSON & WHEELER, *supra* note 4, at 37, 38 n.127 (noting that in 2010, the ABA recommended that DHS pilot lawyer approval of NTAs).

112. Telephone Interview by Dorothy DiPiscali with Stan Weber, Former Senior Attorney, ICE/INS (Jan. 23, 2012).

113. Hutchinson Memo, *supra* note 109, at 2.

114. BENSON & WHEELER, *supra* note 4, at 38.

failure to remove the individual."[115] Accordingly, over-charging and over-detaining mistakes are "common."[116] One review found 117 cases over ten years in which an "aggravated felony" determination was overturned.[117] Another review of appealed *Joseph* decisions found forty-five immigration judge rulings overturning mandatory detention over a four-year period.[118]

Other procedural deficiencies make it likely that a mandatory detainee may not know he has a right to a *Joseph* hearing challenging his detention. The Notice of Custody is provided to the detainee in English.[119] It affirmatively misadvises mandatory detainees, despite the available *Joseph* hearing, that they "may not request a review of this determination by an immigration judge because the Immigration and Nationality Act prohibits your release from custody."[120] No other DHS notice of the right to a *Joseph* hearing is provided, nor required. Still, if the mandatory detainee checks a box stating "I do request a redetermination of this custody decision by an immigration judge," it appears in practice that an immigration judge may provide a *Joseph* hearing.[121]

2. The *Joseph* Hearing and Bond Determinations

At the *Joseph* hearing, a detainee may challenge the legal basis for his mandatory detention before an immigration judge. It represents a detainee's only chance to challenge the non-lawyer DHS' officer's decision.[122] The *Joseph* hearing is an "informal proceeding."[123] There are no regulations governing the *Joseph* hearing. Hearings are neither required[124] nor

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115. *Id.*

116. JAILED WITHOUT JUSTICE, *supra* note 4, at 19; Telephone Interview with Ken Mayeaux, Professor of Prof'l Practice, La. State Univ. Law Ctr. (Dec. 13, 2011) (notes of interview on file with author).

117. JAILED WITHOUT JUSTICE, *supra* note 4, at 20, 49–50 n.77, 50 n.82.

118. *See* Julie Dona, *Making Sense of "Substantially Unlikely": An Empirical Analysis of the* Joseph *Standard in Mandatory Detention Custody Hearings*, GEO. IMMIGR. L.J. (forthcoming) (manuscript at 10), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1856758.

119. *See* U.S. DEP'T HOMELAND SECURITY, FORM I-286, NOTICE OF CUSTODY DETERMINATION (Rev. Aug. 1, 2007)

120. *Id.*

121. Telephone Interview by Dorothy DiPiscali with Stan Weber, *supra* note 112.

122. Joseph, 22 I. & N. Dec. 799, 800 (B.I.A. 1999); Shalini Bhargava, *Detaining Due Process: The Need for Procedural Reform in "*Joseph*" Hearings After* Demore v. Kim, 31 N.Y.U. REV. L. & SOC. CHANGE 51, 75 (2006).

123. Kaufman, *supra* note 14, at 118; *see also* DEP'T OF JUSTICE, IMMIGRATION COURT PRACTICE MANUAL 9.3(e), (e)(vi) (2008), *available at* http://www.justice.gov/eoir/vll/OCIJPracManual/Chap%209.pdf.

124. DEP'T OF JUSTICE, *supra* note 123, at 9.3(d).

recorded.[125] Hearings may be held in person, by videoconference, or by telephone.[126] Decisions are usually rendered orally and not written unless requested.[127] The hearing may not even be translated.[128]

In practice, *Joseph* hearings may follow procedures for bond redetermination hearings, although nothing requires this.[129] Assuming bond hearing regulations apply, *Joseph* hearings may occur where the immigrant is detained.[130] The hearing must be provided within a "reasonable time," although many are not.[131]

Unlike other preventive detention schemes that place the burden on the government,[132] in the *Joseph* hearing, the immigrant must meet the difficult burden that the government is "substantially unlikely" to establish the mandatory detention charge(s) at the removal hearing.[133] Thus, the immigrant must prove that the government does not have a non-frivolous argument that (1) the charged crimes warrant mandatory detention as, for example, "aggravated felonies" or "crimes of moral turpitude;" (2) the immigrant has been "convicted" of the charged crimes; or (3) the immi-

125. *Id.* at 9.3(e)(iii); DETAINEE WORKING GROUP OF THE NEW YORK UNIVERSITY CHAPTER OF THE NATIONAL LAWYERS GUILD, BROKEN JUSTICE, A REPORT ON THE FAILURES OF THE COURT SYSTEM FOR IMMIGRATION DETAINEES IN NEW YORK CITY, 9 (Sept. 2006–May 2007), *available at* http://nycicop.files.wordpress.com/2010/03/nlg-immigration-court-report-06-07.pdf (discussions of bond were informal, often insufficiently or not at all interpreted for the detainee, and "[t]he only thing entered on the record was the final determination of bond by the judge, after being informed of the results of the attorney's negotiations.").

126. DEP'T OF JUSTICE, *supra* note 123, at 9.1(e). In 2010, video was used in about one-third of bond redetermination hearings. BENSON & WHEELER, *supra* note 4, at 21 & n.59.

127. DEP'T OF JUSTICE, *supra* note 123, at 9.3(e)(vii).

128. IMMIGRATION COURT OBSERVATION PROJECT OF THE NATIONAL LAWYERS GUILD, FUNDAMENTAL FAIRNESS: A REPORT ON THE DUE PROCESS CRISIS IN NEW YORK CITY IMMIGRATION COURTS, 9, 11 (2011) [hereinafter ICOP, FUNDAMENTAL FAIRNESS] *available at* http://nycicop.files.wordpress.com/2011/05/icop-report-5-10-2011.pdf (observing bond hearings not translated for detainees with limited English proficiency).

129. Practitioners generally assume that *Joseph* hearings are conducted under similar rules as bond redetermination hearings. Telephone Interview by Dorothy DiPiscali with Stan Weber, *supra* note 112; Telephone Interview with Ken Mayeaux, *supra* note 116.

130. 8 C.F.R. § 1003.19(c) (2012).

131. Heeren, *supra* note 19, at 602 (client mandatorily detained for three years); Sayed, *supra* note 17, at 1842 n.52, 1852 n.105 (collecting cases).

132. *See, e.g.*, 18 U.S.C. § 4248(d) (2006) (civil commitment of sex offender upon "clear and convincing" evidence).

133. Joseph, 22 I. & N. Dec. 799, 800 (B.I.A. 1999); *see also* Bhargava, *supra* note 122, at 74–75 n. 185; Sayed, *supra* note 17, at 1856; Alina Das, Immigration Detention: Information Gaps and Institutional Barriers to Reform 16 (unpublished manuscript) (on file with the University of Chicago Law School), *available at* http://www.law.uchicago.edu/files/file/Das_0.pdf (arguing that high burden at *Joseph* hearing leads to more inaccurate mandatory detention decisions).

grant is an alien, not a citizen.[134] Typically the *Joseph* detention issue, absent other deportation grounds, will be later re-litigated as the ultimate deportation issue.[135]

Thus, a *Joseph* hearing involves a decision based on "incomplete facts and unresolved legal questions."[136] The judge's determination may be based on "any information that is available to the Immigration Judge or that is presented to him or her by the alien or the [government]."[137] Accordingly, the immigrant may offer factual evidence or legal authority.[138] "[W]itnesses may be placed under oath and testimony taken," but at the judge's discretion.[139] That said, there is a "traditional reluctance to permit discovery" in immigration matters.[140] Moreover, ICE commonly requires immigrants to file Freedom of Information Act (FOIA) requests for government documents, since unlike a criminal case, *Brady* disclosures to criminal defendants are not required.[141] Thus, all this assumes the detainee could independently produce witnesses and evidence while detained, or contact a lawyer or family to do so.[142] Conversely, the government may meet its burden only with some "reason to believe" that mandatory detention is warranted,[143] even based upon improperly certified or unofficial evidence.[144] Further, immigration judges commonly grant DHS adjournments to produce evidence while the immigrant remains detained.[145]

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134. *See generally infra* Section I.C.

135. Gerald Seipp & Sophie Feal, *The Mandatory Detention Dilemma: The Role of the Federal Courts in Tempering the Scope of INA § 236(c)*, 10-07 IMMIGR. BRIEFINGS 1, 5–6 & nn.45–46 (2010).

136. Dona, *supra* note 118 (manuscript at 12).

137. 8 C.F.R. § 1003.19(d) (2012).

138. *See* Demore v. Kim, 538 U.S. 510, 514 n.3 (2003).

139. DEP'T OF JUSTICE, *supra* note 123, at 9.3(e)(vi).

140. Das, *supra* note 3, at 1685, (quoting 1 CHARLES GORDON ET AL., IMMIGRATION LAW & PROCEDURE § 3.07[3][b][ii][A] (2011)).

141. *Compare* BENSON & WHEELER, *supra* note 4, at 71 & n.195, (citing 8 C.F.R. §§ 103.8, 103.9, 103.10 (2011)), *with* Brady v. Maryland, 373 U.S. 83 (1963) (constitutionally requiring prosecution to disclose exculpatory evidence to criminal defendant). The Ninth Circuit has questioned the constitutionality of this practice. Dent v. Holder, 627 F.3d 365, 374 (9th Cir. 2010) (unconstitutional to deny respondent access to his government file "until it was too late to use it"). *See generally* Anne R. Traum, *Constitutionalizing Immigration Law on its Own Path*, 33 CARDOZO L. REV. 431, 539–42 (2011).

142. JAILED WITHOUT JUSTICE, *supra* note 4, at 34; NYIRS, *supra* note 6, at 387.

143. De la Cruz, 2008 WL 486898, at *1 (B.I.A. Jan. 28, 2008) (BIA "need not conclusively establish based on the undeveloped bond record whether both of the respondent's convictions constitute crimes involving moral turpitude . . . .").

144. *See* JAILED WITHOUT JUSTICE, *supra* note 4, at 23 (noting that oral testimony is sufficient); Dona, *supra* note 118 (manuscript at 15) (citing Jose Arturo Nuno-Sanchez, 2007 WL 4707447 (B.I.A. Nov. 28, 2007) (finding that an uncertified document from an Internet site was sufficient "reason to believe")).

145. JAILED WITHOUT JUSTICE, *supra* note 4, at 23.

If the immigrant loses the *Joseph* hearing, he generally remains detained pending his deportation hearing.[146] He may appeal to the BIA and eventually with the appropriate court of appeals, although he remains detained and his removal case moves forward.[147] He also may file for *habeas* in federal district court.[148]

If the immigrant wins the *Joseph* hearing, he then may receive a bond hearing, at which the immigration judge individually determines flight risk or danger to the community.[149] Bond may be set at $1,500 or above.[150] If the immigrant makes bond, he may be released. However, DHS may invoke an "automatic stay" provision by noticing its intent to appeal bond; this keeps the immigrant detained and renders the *Joseph* and bond hearings an "empty gesture" for several months.[151]

3. Removal Hearing

The cascading impact of detention also affects the detainee's ability to litigate the eventual removal hearing. After the *Joseph* and/or bond hearing, a "master calendar hearing" is held, which roughly compares to a criminal arraignment.[152] The immigrant is brought before an immigration judge for an initial determination of the charges. He may contest the charges or claim relief from removal.[153] Alternatively, the immigrant may admit to the charged immigration violation and agree to "voluntarily depart" the United States with ICE's permission.[154] If the immigrant does not voluntarily depart, he will ultimately receive an individual merits hearing.[155]

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146. 8 C.F.R. § 1003.19(e) (2012) (showing immigrants cannot ask for a redetermination unless a "material change of circumstances" occurs, even if they secure counsel).

147. 8 C.F.R. § 1236.1(d)(3)(i), (d)(4) (2012).

148. Sayed, *supra* note 17, at 1843 n.52, 1852 n.105.

149. Kaufman, *supra* note 14, at 118 (citing Sugay, 17 I. & N. Dec. 637, 638–39 (B.I.A. 1981)).

150. 8 U.S.C. § 1226(a)(2)(2006).

151. Ashley v. Ridge, 288 F. Supp. 2d 662, 668 (D.N.J. 2003); 8 C.F.R. § 1003.19(i)(2) (2012); Raha Jorjani, *Ignoring the Court's Order: The Automatic Stay in Immigration Detention Cases*, 5 INTERCULTURAL HUM. RTS. L. REV. 89, 119–20 (2010) (noting that an automatic stay enables detention during appeal for an extra 150-77 days). The BIA also possesses general discretionary authority to stay the IJ's order, either on DHS's motion or its own. 8 C.F.R. § 1003.19(i)(1).

152. BENSON & WHEELER, *supra* note 4, at 14. *See generally* Kaufman, *supra* note 14, at 119.

153. *See* Marks, *supra* note 67, at 110–11.

154. 8 U.S.C. § 1229c (2006); 8 C.F.R. § 240.25 (2007). Voluntary departure, as opposed to departure under a removal order, is often more beneficial to the immigrant, as certain bars on re-entry may not apply. *See* BENSON & WHEELER, *supra* note 4, at 18.

155. 8 U.S.C. § 1229a (2006).

The merits hearing "generally conform[s] to the ... familiar adversarial model," albeit without many criminal procedural protections.[156] An immigration judge presides, and the immigrant must litigate against a government attorney.[157] ICE must show deportability by "reasonable, substantial and probative evidence."[158] The immigrant can testify, present witnesses, cross-examine government witnesses, and object to government evidence.[159] However, strict rules of evidence (such as hearsay) do not apply.[160] The immigration judge will either find for the immigrant or enter a removal order.[161] If a removal order is entered, DHS again mandatorily detains the immigrant under different statutory authority,[162] albeit subject to some constitutional constraints.[163]

C. *Types of Legal Challenges to Mandatory Detention at the* Joseph *Hearing*

As noted, a *Joseph* challenge to detention potentially involves three grounds: (1) the charged crime does not statutorily warrant mandatory detention, (2) the immigrant has not been "convicted" of the charged crime, or (3) the immigrant is a citizen, not an alien. The complexity of litigating these issues has increased as immigration courts incorporate more searching factual inquiries requiring trial-type evidentiary hearings.

1. Beyond Categorical Analysis: Challenges to Immigration Classifications of Criminal Convictions

The most common *Joseph* challenge is that the immigrant's prior criminal conviction does not fall within an immigration category requiring mandatory detention.[164] Federal immigration law primarily uses categories of crimes to trigger detention and deportation, rather than

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156. Kaufman, *supra* note 14, at 119 & n.34 (quoting THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 629 (4th ed. 1998)).

157. The INA requires the IJ to play a limited investigative role. *Id.*

158. 8 U.S.C. § 1229a(c)(3)(A) (2006).

159. DEP'T OF JUSTICE, *supra* note 123, § 4.16.

160. Wadud, 19 I. & N. Dec. 182 (B.I.A. 1984).

161. Kaufman, *supra* note 14, at 120. Orders of removal are generally subject to administrative and judicial review, although appellate review is restricted or barred for certain grounds of deportability or denials of discretionary relief. Appeals are first to the BIA, then to a federal court of appeals, and finally to the U.S. Supreme Court. *Id.*; *see also* 8 U.S.C. § 1252 (2006).

162. *See generally* Kaufman, *supra* note 14, at 120.

163. Zadvydas v. Davis, 533 U.S. 678 (2001). *See generally* Kaufman, *supra* note 14, at 120–21.

164. 77 percent of a sample of 167 *Joseph* hearing appeals to the BIA involved a challenge to the immigration classification of a conviction. *See* Dona, *supra* note 118 (manuscript at 2–4).

cross-referencing specific state or local criminal statutes.[165] Accordingly, an LPR is mandatorily detained if convicted of (a) an "aggravated felony,"[166] (b) two "crimes involving moral turpitude" ("CIMTs") at any time after admission into the United States,[167] (c) one crime involving moral turpitude with a term of imprisonment of more than one year,[168] (d) a controlled substance offense,[169] or (e) a firearm offense.[170] Of these categories, the most common *Joseph* challenges are that a crime is not an "aggravated felony" or a "crime involving moral turpitude."[171] Any of these categories, if met, would also render the immigrant removable.[172] As Justice Alito argued, "determining whether a particular crime is an 'aggravated felony' or a 'crime involving moral turpitude' is not an easy task."[173] This section summarizes, as succinctly as possible, the typical analysis involved.

a. *Aggravated Felonies*

The term "aggravated felony" is an immigration law term of art and is not connected to a state criminal statute's definition of a felony. Rather, an aggravated felony is defined by reference to its twenty-one subcategories.[174] Some of the sub-categories specifically reference other statutes.[175] Other sub-categories do not.[176] Many crimes not ordinarily categorized as aggravated felonies become aggravated felonies if a sentence of one year or more is imposed.[177] Further complicating matters, the BIA and courts commonly interpret the aggravated felony statute differently.[178]

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165. Das, *supra* note 3, at 1672.

166. 8 U.S.C. § 1226(c)(1)(B) (2006).

167. *Id.*

168. *Id.* § 1226(c)(1)(C).

169. *Id.* § 1226(c)(1)(A).

170. *Id.* § 1226(c)(1).

171. Dona, *supra* note 118 (manuscript at 13). Of those 129 cases, 52 percent involved challenges to a CIMT, 27 percent challenged an aggravated felony, and the rest were challenges to controlled substances or firearms convictions. *Id.*

172. *See* 8 U.S.C. § 1227(a)(2)(A)(i), (iii) (2006).

173. Padilla v. Kentucky, 130 S. Ct. 1473, 1488 (2010) (Alito, J., concurring).

174. 8 U.S.C. § 1101(a)(43)(A)-(U) (2006); *see also* Bhargava, *supra* note 122, at 58 (summarizing aggravated felony provisions).

175. 8 U.S.C. § 1101(a)(43)(F) (2006) (listing "a crime of violence (as defined in section 16 of title 18 . . . .").

176. *See id.* § 1101(a)(43)(G) (defining "a theft offense" or "burglary offense" as one in which "the term of imprisonment [sic] at least one year").

177. *Id.*

178. *Padilla*, 130 S. Ct. at 1488–89.

Circuit splits are common,[179] and even within circuits, the distinctions can be "dizzying."[180]

Moreover, the "aggravated felony" determination may encompass minor criminal conduct. An aggravated felony may include attempted possession of a controlled substance,[181] possession of marijuana with intent to distribute,[182] simple assault with a suspended sentence,[183] or petty theft with a prior jail term.[184] Because the "aggravated felony" provision is retroactive, even convictions committed long ago may constitute aggravated felonies even if they would not have resulted in deportation.[185]

Traditionally, determination of an "aggravated felony" has been governed by categorical analysis, under which the immigration court analyzes "the nature of the crime, as defined by statute and interpreted by the courts and as limited and described by the record of conviction."[186] Although categorical analysis limits the factual inquiry to the record of conviction, the statutory and legal analysis remains quite complicated, involving a two-step analysis.[187] First, courts employ a "strict categorical approach," which is an examination of the statutory definition of the criminal offense to determine if it is any broader than the relevant definition of an "aggravated felony."[188] If the definition is broader, the court proceeds to a "modified categorical approach,"[189] and consults the official record of conviction to determine which part of the criminal statute served as the basis for the immigrant's conviction.[190] The record of

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179. The Supreme Court has resolved several recently. *See* Carachuri-Rosendo v. Holder, 130 S. Ct. 2577 (2010); Gonzales v. Duenas-Alvarez, 549 U.S. 183 (2007); Lopez v. Gonzalez, 549 U.S. 47 (2006); Leocal v. Ashcroft, 543 U.S. 1 (2004).

180. *Padilla*, 130 S. Ct. at 1489 (Alito, J., concurring) (describing conflicting Ninth Circuit opinions on whether simple drug possession constitutes an aggravated felony).

181. *Id.* (citing 8 U.S.C. § 1101(a)(43) (2006)). *See generally* Maureen Sweeney, *Fact or Fiction: The Legal Construction of Immigration Removal for Crimes*, 27 YALE J. ON REG. 47, 66 (2010).

182. Julce v. Mukasey, 530 F.3d 30, 32 (1st Cir. 2008).

183. United States v. Cordoza-Estrada, 385 F.3d 56, 57 (1st Cir. 2004) (covering simple assault for punching a man in the face).

184. Mutascu v. Gonzales, 444 F.3d 710, 711 (5th Cir. 2006).

185. 8 U.S.C. § 1101(a)(43)(U) (2006).

186. Pichardo-Sufren, 21 I. & N. Dec. 330, 335 (B.I.A. 1996); *see also* Das, *supra* note 3, at 1674.

187. Nijhawan v. Holder, 129 S. Ct. 2294, 2299 (2009) ("[T]he categorical method is not always easy to apply . . . ."); Das, *supra* note 3, at 1674–75.

188. *Id.* at 1674 n.18. Different circuits use different tests to ascertain the first step of categorical analysis. *See generally* Pooja R. Dadhania, Note, *The Categorical Approach for Crimes Involving Moral Turpitude After* Silva-Trevino, 111 COLUM. L. REV. 313, 326–37 & n.72 (2011).

189. Das, *supra* note 3, at 1674 n.18.

190. *Nijhawan*, 129 S. Ct. at 2299 ("[A] court must determine whether an offender's prior conviction was for the violent, rather than the nonviolent, break-ins" that a statute proscribes.).

conviction includes, at a minimum, the complaint, indictment or other charging document, any plea agreement, any plea colloquy transcript, a verdict or judgment of conviction,[191] and jury instructions or other records.[192]

Today, aggravated felony determinations may go beyond categorical analysis to involve litigation of facts relating to the criminal conviction. Courts now use a more factual, circumstance–specific approach. Courts will look at whether the aggravated felony subcategory at issue refers "to the particular circumstances in which an offender committed the crime on a particular occasion."[193] If it does, *pro se* detainees must litigate a "potentially endless" set of documents and evidence[194]—e.g., admissions in restitution orders and stipulations,[195] pre-sentence reports,[196] police reports, or witness statements.[197] New testimony, witnesses, or trial transcripts may be introduced regarding factual allegations untested or contradicted in criminal court.[198] Indeed, most cases resolved by guilty plea lack a factual record. Prior to AEDPA and IIRIRA's retroactive expansion of crimes that trigger immigration consequences, and *Padilla v. Kentucky*, many criminal lawyers never envisioned their client would be detained and deported (if they considered immigration consequences at all).[199] That all said, the factual approach allows relitigation of the facts only one way, since the immigrant cannot relitigate the conviction itself.[200]

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191. *See* Short, 20 I. & N. Dec. 136, 137–38 (B.I.A. 1989).

192. *See* United States v. Johnson, 130 S. Ct. 1265, 1273 (2010); *Nijhawan*, 129 S. Ct. at 2302–03.

193. *Nijhawan*, 129 S. Ct. at 2300–01 (citing 8 U.S.C. § 1101(a)(43)(M)(i) (2006)) (explaining that under the "fraud and deceit" aggravated felony subcategory, which requires a loss to the victim exceeding $10,000, since loss was not an element of the conviction, it was appropriate to determine loss by looking beyond the record of conviction to the underlying facts and circumstances). *Nijhawan* listed other aggravated felony subcategories that might require a similar approach. *Id.* at 2296 (citing 8 U.S.C. §§ 1101(a)(43)(M)(ii), (K)(ii), (P), (N) (2006)).

194. *Cf.* Das, *supra* note 3, at 1729.

195. *Nijhawan*, 129 S. Ct. at 2303.

196. Arguelles-Olivares v. Mukasey, 526 F.3d 171, 178–79 (5th Cir. 2008).

197. Das, *supra* note 3, at 1706 (citing Taylor v. United States, 495 U.S. 575, 601 (1990)).

198. In most cases, the defendant would have been appointed a lawyer in criminal court, albeit not always for minor crimes that may still constitute aggravated felonies. Clapman, *supra* note 94, at 587–88, 590–95.

199. *Taylor*, 495 U.S. at 601–02. This is different today after *Padilla*. *See* Marks, supra note 67, at 105 (noting that "seasoned immigration practitioners have become virtually obsessive in developing records" in criminal cases); *cf.* Jaclyn Kelley, *An Immigrant's Decision to Plea or Not to Plea: Retroactive Availability of* Padilla v. Kentucky *to Noncitizen Defendants on State Postconviction Review*, 18 MICH. J. RACE & L. 213 (2012) (describing pre-*Padilla* regime where counsel had no constitutional duty to advise on immigration consequences).

200. Das, *supra* note 3, at 1726 n.274.

All these issues are tremendously difficult for a *pro se* detained immigrant to litigate due to statutory complexity, the difficulty of accessing criminal records, evidence, or witnesses (especially for crimes committed long ago), and the informality of the *Joseph* hearing and lack of mechanisms for discovery.[201]

b. *Crimes Involving Moral Turpitude (CIMTs)*

The term "moral turpitude" is also an immigration law term of art, and one that particularly evades precise definition.[202] A "crime involving moral turpitude" is generally defined as one that "shocks the public conscience as being inherently base, vile, or depraved, and contrary to the accepted rules of morality."[203] Generally, CIMTs involve some element of fraud, larceny, or intent to harm persons or property.[204] The term may encompass minor conduct, such as turnstile jumping,[205] shoplifting,[206] or a disorderly persons offense.[207]

As with aggravated felony analysis, CIMT determinations have expanded beyond categorical analysis.[208] Immigration courts now possess enormous discretion to consider "any additional evidence or factfinding" beyond the CIMT record of conviction.[209] The Attorney General imposed this standard upon immigration courts in his 2008 executive decision *Matter of Silva-Trevino*.[210] Many immigration judges now hold "*Silva-Trevino* hearings" to hear additional facts bearing on inadmissibility or removability, although it is unclear whether judges combine these with

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201. *Id.* at 1728–29; *see also supra* notes 69–80 and accompanying text. For recidivist offenses, records of prior criminal convictions may be relevant as well. Fernandez v. Mukasey, 544 F.3d 862, 870 (7th Cir. 2008).

202. 8 U.S.C. § 1227(a)(2)(A) (2006); Padilla v. Kentucky, 130 S. Ct. 1473, 1489 (2010) (Alito, J., concurring).

203. Solon, 24 I. & N. Dec. 239, 240 (B.I.A. 2007).

204. Dadhania, *supra* note 188, at 319 & n.35.

205. Mojica v. Reno, 970 F. Supp. 130, 137 (E.D.N.Y. 1997) (noting that under section 440(d), turnstile jumping leading to a "theft of services" misdemeanor conviction is a "crime of moral turpitude," subject to deportation).

206. Scarpulla, 15 I. & N. Dec. 139, 140–41 (B.I.A. 1974) ("Theft or larceny, whether grand or petty, has always been held to involve moral turpitude."); *see* Markowitz, *supra* note 15, at 1302 n.11.

207. Castillo v. Att'y Gen., 411 F. App'x 500 (3d Cir. 2011).

208. Marks, *supra* note 67, at 105 (calling *Silva-Trevino* a "major sea-change" constituting "another giant leap" towards an approach unique to immigration law).

209. Silva-Trevino, 24 I. & N. Dec. 687, 690, 708 (A.G. 2008); *see also* Marks, *supra* note 67, at 105 (courts now possess a "tremendous amount of discretion"). The Attorney General reasoned as such because "moral turpitude" is typically not an element of a criminal offense. *Id.* at 699.

210. Silva-Trevino, 24 I. & N. Dec. 687.

Joseph hearings.[211] The Seventh Circuit and BIA follow this *Silva-Trevino* expanded factual inquiry,[212] while the Third, Fourth, and Eighth Circuits have rejected it.[213]

2. Challenges to Immigration Impact of Non-Conviction Criminal Dispositions

The immigrant may also challenge whether the particular disposition of his criminal case constitutes a "conviction" under federal immigration law.[214] These types of *Joseph* challenges are the second-most common.[215] "Conviction" is also a term of art in federal immigration law, and like the other *Joseph* determinations, the required analysis is complicated.[216] Many criminal dispositions that are not convictions may still render an immigrant mandatorily detained and deportable;[217] a violation or offense,[218] a dismissal,[219] a deferred adjudication,[220] a juvenile adjudication,[221] a revoked sentence,[222] an expungement or nullification,[223]

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211. Marks, *supra* note 67, at 105.

212. Ali v. Mukasey, 521 F.3d 737, 741–42 (7th Cir. 2008); Guevara Alfaro, 25 I. & N. Dec. 417, 420 (B.I.A. 2011).

213. Prudencio v. Holder, 669 F.3d 472, 476 (4th Cir. 2012); Guardado-Garcia v. Holder, 615 F.3d 900, 902 (8th Cir. 2010); Jean-Louis v. Att'y Gen., 582 F.3d 462, 470 (3d Cir. 2009).

214. *See* Andrew Moore, *Criminal Deportation, Post-Conviction Relief and the Lost Cause of Uniformity*, 22 GEO. IMMIGR. L.J. 665, 677 (2008).

215. 11 percent of appeals to the BIA over a four-year period involved challenges to whether a criminal disposition constituted a conviction. Dona, *supra* note 118 (manuscript at 13, tbl.4); *see also* E-mail from Julie Dona, Judicial Clerk, The Honorable Judge Paul L. Friedman of the U.S. District Court for the District of Columbia (Mar. 16, 2012) (on file with the author); E-mail from Julie Dona, Judicial Clerk, The Honorable Judge Paul L. Friedman of the U.S. District Court for the District of Columbia (Oct. 2, 2011) (attached unpublished data) (on file with author). This 11 percent reflects 19 cases, some which Dona classified as relating to "conviction status," and some which Dona classified as relating to "evidence-based challenges." Dona, *supra* note 118 (manuscript at 13, tbl.4).

216. Padilla v. Kentucky, 130 S. Ct. 1473, 1489 (2010) (Alito, J., concurring).

217. *Id.* at 1490 n.2.

218. *See* Hussein v. Att'y Gen., 413 F. App'x 431, 432 (3d Cir. 2010) (disorderly persons offense for possessing drug paraphernalia constituted "conviction").

219. *Padilla*, 130 S. Ct. at 1490 n.2.

220. *Id.* Where a deferred adjudication statute requires a guilty plea, *nolo contendere* plea, or an admission of sufficient facts to warrant a finding of guilt, and some form of punishment, penalty, or restriction (such as a rehabilitative program) is imposed, such disposition is considered a conviction for immigration purposes. *See* Marks, *supra* note 67, at 106.

221. Uritzky v. Gonzalez, 399 F.3d 728, 731 (6th Cir. 2005).

222. Montenegro v. Ashcroft, 355 F.3d 1035, 1037 (7th Cir. 2004).

223. *See* Marks, *supra* note 67, at 106; Salazar-Regino, 23 I. & N. Dec. 223, 234 (B.I.A. 2002) ("Congress did not intend to provide any exceptions from its statutory definition of a conviction for expungements pursuant to state rehabilitative proceedings.").

or a pardon[224] may, depending on the circumstances, qualify as a "conviction."[225] Thus, challenging a conviction can be difficult for a detainee because it requires a detainee to gather evidence potentially outside his reach (most prominently, the record of conviction).

3. Establishing Citizenship

Third, in order to challenge his deportation, the immigrant may show at a *Joseph* hearing that he is a citizen. These are the least common *Joseph* challenges, perhaps because detainees without counsel do not know they can raise citizenship claims.[226]

Questions of citizenship, like every other issue at a *Joseph* hearing, are "not always simple."[227] This is particularly true for U.S. citizens who have acquired or derived citizenship after birth. An individual born abroad may "acquire" U.S. citizenship if at least one parent is a U.S. citizen and other complicated criteria are satisfied.[228] Alternatively, one may "derive"

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224. The INA clearly lays out the categories of conviction that may not be cured by pardon. 8 U.S.C. §§ 1227(a)(2)(A)(v), (2)(B)(i), (2)(C), (2)(D)(iii)-(iv), (3)(C)(i) (2006) (showing that a pardon for a controlled substance offense, domestic violence offense, or firearm offense may not cure the immigration impact of the conviction).

225. That said, vacatur of a conviction via *habeas* for ineffective assistance of counsel negates the immigration consequences of a criminal conviction. *See* Adamiak, 23 I. & N. Dec. 878, 879 (B.I.A. 2006).

226. Marks, *supra* note 67, at 94; IACHR, *supra* note 4, ¶ 99 n.124. Dona found four cases in a four-year period—2.4 percent of the appealed *Joseph* decisions—in which the detainee claimed U.S. citizenship, and in each, counsel represented the detainee. Dona, *supra* note 118 (manuscript at 9, 13 tbl.4). In 2007, the Vera Institute identified 322 persons in detention with potential U.S. citizenship claims. NINA SIULC ET AL., VERA INSTITUTE OF JUSTICE, IMPROVING EFFICIENCY AND PROMOTING JUSTICE IN THE IMMIGRATION SYSTEM: LESSONS FROM THE LEGAL ORIENTATION PROGRAM 1 (2008), *available at* http://www.vera.org/download?file=1780/LOP%2Bevaluation_May2008_final.pdf.

Since the current constitutionality of mandatory immigration detention rests on plenary power principles affecting non-citizens, the adjudication of citizenship claims at a *Joseph* hearing while detained appears constitutionally indefensible. Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POL'Y & L. 606, 637–38 (2011).

227. Padilla v. Kentucky, 130 S. Ct. 1473, 1489 n.1 (2010). *See generally* Stevens, *supra* note 226, at 637–38.

228. The individual born abroad is a U.S. citizen if both parents are U.S. citizens and one parent "has had a residence in the United States" prior to the child's birth. 8 U.S.C. § 1401(c) (2006). If the individual is born abroad to parents, one of whom is a U.S. citizen and the other a U.S. "national" but not "citizen," then the individual is a U.S. citizen at birth if the U.S.-citizen parent resided in the United States "for a continuous period of one year" prior to the child's birth. *Id.* § 1401(d). An individual born outside the United States to a U.S. citizen and a noncitizen is a U.S. citizen at birth if the citizen parent was "physically present" in the United States for "a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years" prior to the child's birth. *Id.* § 1401(g).

citizenship if one is born abroad and a parent subsequently becomes a naturalized citizen before the child turns eighteen and other complicated criteria are met.[229] Thus, the factual evidence may include testimony or affidavits of the detainee or his relatives, past immigration records, parallel court orders, census reports, school records, or baptismal certificates.[230] All of this may be difficult to acquire while detained, and complicated to present as evidence while *pro se*.[231]

II. THE PROCEDURAL DUE PROCESS REVOLUTION APPLIED TO IMMIGRATION DETENTION AND DEPORTATION: CONSTITUTIONAL REVIEW DESPITE PLENARY POWER DOCTRINE

The application of procedural due process analysis to immigration proceedings was not fully realized in the courts for several decades. However, after the 1970s procedural due process revolution, ushered in by cases such as *Goldberg v. Kelly*,[232] immigration benefits were no longer consigned to the lesser "privilege" characterization of the rights/privileges dichotomy.[233] Subsequently, courts have increasingly distinguished Congress' plenary power over *substantive* immigration classifications from courts' ability to review the procedural *means* attendant to those determinations.[234] Appointed counsel would be a classic change to the means attending a detention and deportation classification, rather than to the detention and deportation classification itself.[235]

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229. The child may derive citizenship if the naturalized citizen parent applies for citizenship on behalf of the child, and (1) the child is under the age of 18, (2) either the applicant or the applicant's U.S.-citizen parent was physically present in the United States for period(s) totaling five years, at least two of which were after the age of 14, (3) the child is residing outside of the United States in the applicant's legal and physical custody, and (4) the child is temporarily present in the United States pursuant to a lawful admission, and is maintaining such lawful status. 8 U.S.C. § 1433(a) (2006); Sungjee Lee, *Derivative Citizenship Through Parents*, 16 J. CONTEMP. LEGAL ISSUES 43, 45–46 (2007).

230. Stevens, *supra* note 226, at 659. For example, the BIA erroneously reversed a *Joseph* decision that a detainee had derived citizenship from his citizen father because the BIA interpreted state law to "require a court order or judgment of custody before the father of a child born out of wedlock will be deemed to have legal custody of the child." The parents could not produce such a court order, even though both testified at the *Joseph* hearing. Monteiro Pina, 2007 WL 2197542, at *2 (B.I.A. 2007), *rev'd*, Pina v. Mukasey, 542 F.3d 5, 7–8, 12 (1st Cir. 2008).

231. One U.S. citizen detainee who lacked access to his birth certificate worked for a dollar a day in the prison kitchen to earn thirty dollars to order a copy and be released. JAILED WITHOUT JUSTICE, *supra* note 4, at 20.

232. 397 U.S. 254, 262 (1970).

233. *Id.*; Motomura, *supra* note 38, at 1650–56.

234. Demore v. Kim, 538 U.S. 510, 532 (2003) (Kennedy, J., concurring).

235. *See* Motomura, *supra* note 38, at 1628–29. That said, as set forth in Section III.C.3, appointed counsel also impacts substantive fundamental values. *See id.* (calling the right to appointed counsel a "procedural surrogate" with significant substantive content

"Plenary power" doctrine dates to the *Chinese Exclusion Case* of 1889, in which the Court held that the federal government has plenary power as incident to sovereignty to regulate admission and exclusion of aliens, even though it is not explicitly granted by the Constitution.[236] Subsequent cases extended "plenary power" doctrine to deportation.[237] Accordingly, the government can discriminate among different nationalities or on protected First Amendment grounds in admitting, excluding, or deporting immigrants in a way it cannot in most other contexts.[238]

However, courts have always recognized (if not always vigilantly enforced) a procedural due process "exception" to plenary power, so as to review the procedures governing immigration determinations.[239] As Henry Hart put it, "a power to lay down general rules, even if it were plenary, did not necessarily include a power to be arbitrary."[240] After the 1970s due process revolution, the ascendancy of the "liberty" interest was formally recognized by the *Mathews* balancing test. Courts increasingly recognized that lawful permanent residents possessed liberty interests, which detention impacted, as described below.

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that "inevitably considers the due process enjoyed by others who are similarly situated"); *see also* Gideon v. Wainwright, 372 U.S. 335, 343 (1963).

236. Chae Chan Ping v. United States (Chinese Exclusion Case), 130 U.S. 581, 603–07 (1889); Motomura, *supra* note 38, at 1626 & n.2. This view is now largely discredited. *See* Markowitz, *supra* note 15, at 1310–13. *See generally* T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of* Zadvydas v. Davis, 16 GEO. IMMIGR. L.J. 365 (2002); T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862, 870 (1989); Gabriel Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257 (1999); Henry M. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1389–96 (1953); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 863 (1987); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255; Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925, 927 n.9 (1995); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 14–30 (1984).

237. Fong Yue Ting v. United States, 149 U.S. 698, 728, 731 (1893).

238. *See* Harisiades v. Shaughnessy, 342 U.S. 580, 596–97 (1952) (Frankfurter, J., concurring).

239. Landon v. Plasencia, 459 U.S. 21, 33 (1982) (summarizing cases); Kwong Hai Chew v. Colding, 344 U.S. 590, 601–03 (1953) (finding on sub-constitutional grounds that regulation denying an exclusion hearing did not apply to a returning permanent resident who had been serving on an American merchant vessel); Yamataya v. Fisher, 189 U.S. 86 (1903) (noting that procedural due process applied to deportation proceedings); Motomura, *supra* note 38, at 1638–45 (summarizing cases).

240. Hart, *supra* note 236, at 1390.

A. *Lawful Permanent Residents' (LPRs') Recognized Liberty Interests*

Landon v. Plasencia, in 1982, established under *Mathews* that lawful permanent residents possess a "weighty" liberty interest in deportation proceedings.[241] The Court stated that "once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly."[242] An LPR's liberty interests include the right "to stay and live and work in this land of freedom,"[243] and the "right to rejoin her immediate family," which "ranks high among the interests of the individual."[244] Justice Souter's *Demore* dissent noted that the immigration laws encourage LPRs to establish these ties permanently.[245] Moreover, he found these ties even stronger for LPRs brought as children, who have little reason to feel ties anywhere else.[246]

The *Demore* majority held that the failure to request a *Joseph* hearing, as a concession of deportability, is a waiver of one's constitutional rights as an LPR.[247] However, any mandatory detainee requesting a *Joseph* hearing by definition has made no such concession and retains viable procedural due process arguments.[248]

B. *Immigration Detention's Impact on Liberty Interests*

Generally, while the Court "has remained solicitous of the propriety of detention itself," it has left the door open to procedural due process challenges to immigration detention under *Mathews*.[249] Detention has generally been considered part of the "means" by which deportation is applied, rather than part of the substantive deportation decision and thus outside review.[250]

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241. *Landon*, 459 U.S. 21. *See also* David Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of* Zadvydas v Davis, 2001 SUP. CT. REV. 47, 93–95 (arguing that LPRs should receive constitutional protection on par with citizens).

242. *Landon*, 459 U.S. at 32.

243. *Id.* at 34 (citing Bridges v. Wixon, 326 U.S. 135, 154 (1945)).

244. *Id.* (citing Moore v. City of East Cleveland, 431 U.S. 494, 499, 503–504 (1977) (plurality)).

245. Demore v. Kim, 538 U.S. 510, 544 (2003) (Souter, J., dissenting).

246. *Id.*

247. *Id.* at 514 n.3, 522–23 & n.6. *Cf.* Klein & Wittes, *supra* note 20, at 151 (stating that immigration detention is justified for "removal of those people from the country who are not entitled to live in it").

248. *See supra* Section I.B.2.

249. Motomura, *supra* note 38, at 1655–56; Klein & Wittes, *supra* note 20, at 186 (arguing regarding immigration detention that "the greater possibility of error has triggered the development of much more elaborate procedural protections.").

250. Wong Wing v. United States, 163 U.S. 228, 235 (1896) (permitting detention "to give effect to the provisions for the exclusion or expulsion of aliens"); *see* Kanstroom, *supra* note 8, at 1506–09.

That said, later Cold-War era cases appeared to imply that the power to deport equaled the power to detain.[251] In *Carlson v. Landon*, the Court upheld the Attorney General's order to detain four Communist Party members without bail pending their deportation, holding that deportation was civil and "[d]etention is necessarily a part of this deportation procedure."[252] In *ex rel Mezei*, the Court upheld the exclusion and indefinite detention without a hearing of a returning lawful permanent resident on national security grounds.[253]

After mandatory detention provisions were enacted in the 1980s and 1990s, however, *Zadvydas* and *Demore* re-established the viability of procedural due process challenges to immigration detention procedures.[254] In *Zadvydas*, the Court avoided due process concerns by reading post-removal order detention to no longer authorize detention when "removal is no longer reasonably foreseeable."[255] Conversely, in *Demore*, the Court upheld pre-removal hearing mandatory detention on broad plenary power grounds,[256] but emphasized the availability of individualized procedures to challenge the detention classification.[257]

Lower courts following *Demore* have upheld various procedural due process challenges to mandatory pre-hearing detention. Some have reviewed the difficult burden at a *Joseph* hearing, although no majority panel has yet invalidated it on constitutional grounds.[258] Others have

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Padilla may change the traditional view of immigration detention as incident to a civil process, if deportation is "a unique legal animal that lives in the crease between the civil and criminal labels." Markowitz, *supra* note 15, at 1299. However, such an argument would likely affect *Demore*'s substantive due process analysis that detention decisions are subsumed by plenary power, rather than procedural due process arguments, which are already cognizable. Such an argument may negate the Court's perceived need to find sub-constitutional grounds for constitutional issues, even procedural due process claims. Zadvydas v. Davis, 533 U.S. 678 (2001); Kwong Hai Chew v. Colding, 344 U.S. 590, 601–03 (1953); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990).

251. *See generally* Benson, *supra* note 19, at 21–40; Klein & Wittes, *supra* note 20, at 145–52; David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003, 1038 (2002).

252. 342 U.S. 524, 538 (1952).

253. Shaughnessy v. U.S. *ex rel.* Mezei, 345 U.S. 206, 210 (1953); *see also* U.S. *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.").

254. *Zadvydas*, 533 U.S. 678; Demore v. Kim, 538 U.S. 510, 514 n.3, 531 (2003).

255. *Zadvydas*, 533 U.S. at 699.

256. *Demore*, 538 U.S at 521; *see also* Margaret H. Taylor, *Dangerous by Decree: Detention Without Bond in Immigration Proceedings*, 50 LOY. L. REV. 149, 163 n.73 (2004).

257. *Demore* also emphasized the limited time of detention, which subsequent empirical data has called into question. *Compare Demore*, 538 U.S. at 529 (noting that in 85 percent of the cases in which aliens are mandatorily detained pre-hearing, removal proceedings are completed in an average time of 47 days), *with supra* Section I.A.2.

258. *See, e.g.*, Tijani v. Willis, 430 F.3d 1241, 1246 (9th Cir. 2005) (Tashima, J., concurring); Bhargava, *supra* note 122, at 51.

invalidated prolonged detention beyond the limited time *Demore* considered.[259] The Ninth Circuit has affirmed class-action certification of a due process challenge to mandatory detention provisions.[260]

III. THE RIGHT TO APPOINTED COUNSEL AT A *JOSEPH* HEARING UNDER THE *MATHEWS V. ELDRIDGE* PROCEDURAL DUE PROCESS TEST

Once the case is made that procedural due process applies to mandatory pre-hearing immigration detention, the next question is how it applies. The *Mathews v. Eldridge* test balances three factors: (1) the individual's private interest at stake; (2) the risk of an erroneous deprivation of the interest (as well as the probable value of additional or different procedural safeguards); and (3) the government's interest in using current, rather than additional or different, procedures.[261] Here, I argue that under that test, due process requires appointed counsel at the *Joseph* hearing to challenge detention for (at least) the limited sub-class of mandatorily detained pre-hearing LPR immigrants.

Before considering due process analysis of the *Joseph* hearing, I briefly summarize the current "case-by-case" approach to appointed counsel in underlying removal proceedings. No court opinion has yet considered how detention might impact that analysis.

The leading case on appointed counsel in removal proceedings is *Aguilera-Enriquez v. INS*.[262] There, the Sixth Circuit agreed that procedural due process applied despite deportation's "civil" designation, and was particularly important to lawful permanent residents, for whom deportation may equal "banishment."[263] It also found appointed counsel necessary if an indigent "would require counsel to present his position adequately to an immigration judge."[264] However, the court fashioned a case-by-case ap-

259. *See, e.g.*, Diop v. ICE, 656 F.3d 221, 235 (3d Cir. 2011) (finding detention for nearly three years without individualized hearing unreasonable). *See generally* Kimere Jane Kimball, *A Right to be Heard: Non-Citizens' Due Process Right to In-Person Hearings to Justify Their Detentions Pursuant to Removal*, 5 STAN. J. C.R. & C.L. 159 (2009) (collecting cases on prolonged detention).

260. *See* Rodriguez v. Hayes, 591 F.3d 1105, 1126 (9th Cir. 2009); Order and Preliminary Injunction, *available at* http://www.aclu.org/files/assets/rodriguez_order.pdf (entering preliminary injunction); *see also* Alli v. Decker, 650 F.3d 1007, 1021 (3d Cir. 2011) (reversing denial of class certification).

261. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

262. *See* Aguilera-Enriquez v. INS, 516 F.2d 565, 568 (6th Cir. 1975); *see also* Michelson v. INS, 897 F.2d 465, 468 (10th Cir. 1990); Escobar Ruis v. INS, 787 F.2d 1294, 1297 n.3 (9th Cir. 1986); Barthold v. INS, 517 F.2d 689, 691 (5th Cir. 1975). *See generally* Kanstroom, *supra* note 8, at 1503–04; Kaufman, *supra* note 14, at 136–37.

263. *Aguilera-Enriquez*, 516 F.2d at 568.

264. *Id.* at 568 n.3.

proach.[265] No categorical right to counsel was found because Aguilera-Enriquez did not contest the substantive grounds for his deportation—namely, that his drug conviction rendered him deportable. Thus, the Sixth Circuit found counsel would have made no difference in the proceedings.[266]

Conversely, any mandatorily detained immigrant today bringing a *Joseph* challenge to his detention will, in nearly every case, be challenging his deportability on the same grounds. Counsel would make all the difference to his proceedings—both his detention and potential deportation. However, no published opinion in the thousands of immigration proceedings since *Aguilera-Enriquez* has held a petitioner warrants counsel. As Michael Kaufman argued, "it appears that a right to appointed counsel on a case-by-case basis is effectively no right at all."[267]

A. Private Interest at Stake: The "Cascading Constitutional Deprivation"

First, the pre-hearing mandatorily detained immigrant's private interest at stake is the cascading constitutional deprivation of pre-hearing detention: not just the deprivation of liberty, but its impact on the fundamental fairness of deportation proceedings, in which further deprivation is at stake.

1. Immigration Detention as a Deprivation of Liberty

It is well-settled under *Mathews* that personal liberty, or freedom from incarceration, lies "at the core of the liberty protected by the Due Process Clause,"[268] and its "threatened loss through legal proceedings

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265. *See id.* at 568.

266. *Id.* at 569.

267. Kaufman, *supra* note 14, at 137. That said, the right to *effective* assistance of counsel in deportation proceedings has been traditionally assumed, even absent an explicit finding of a right to appointed counsel in deportation proceedings. Currently, this remains the policy in the immigration adjudication system and several, but not all, circuits. *See* Compean, 25 I. & N. Dec. 1, 3 (A.G. 2009); Compean, 24 I. & N. Dec. 710 (A.G. 2009) (noting that aliens in removal proceedings have no right to counsel). *Compare, e.g.*, Saleh v. U.S. Dep't of Justice, 962 F.2d 234, 241 (2d Cir. 1992) (finding a constitutional right to effective assistance of counsel), *with* Rafiyev v. Mukasey, 536 F.3d 853, 861 (8th Cir. 2008) (finding that there is no constitutional right under the Fifth Amendment to effective assistance of counsel in a removal proceeding). *See generally* Stephen H. Legomsky, *Transporting* Padilla *to Deportation Proceedings: A Due Process Right to the Effective Assistance of Counsel*, ST. LOUIS U. PUB. L. REV. 43 (2011).

268. Turner v. Rogers, 131 S. Ct. 2507, 2511 (2011); Foucha v. Louisiana, 504 U.S. 71, 80 (1992); *see also* United States v. Salerno, 481 U.S. 739, 750 (1987).

demands 'due process protection.'"[269] The liberty interest in avoiding detention is the same for noncitizens and citizens.[270] Moreover, "civil" incarceration is no different. Generally, courts applying procedural due process analysis have looked beyond the civil or criminal label to whether the facility constitutes an "institution of confinement."[271] If so, incarceration establishes a "rebuttable presumption" towards appointed counsel.[272] Juvenile detention,[273] psychiatric commitment,[274] or civil contempt all constitute severe deprivations of liberty under this analysis.[275]

Preventive detention regimes, increasingly reflect a similar presumption towards heightened due process—and in some instances, appointed counsel—at the hearing challenging detention.[276] A "unifying theme" of preventive detention schemes today—except immigration detention—is that they require rigorous due process to ensure accuracy of individual detention judgments and limit detention only to where necessary.[277] In some instances, such as a pretrial criminal bail hearing and a sexually violent predator civil commitment hearing, the Court has cited the provision of appointed counsel as a factor supporting the substantive constitutionality of preventive detention.[278] This paradigm of preventive detention with due

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269. *Turner*, 131 S. Ct. at 2518 (quoting Addington v. Texas, 441 U.S. 418, 426 (1979)).

270. *See* Cole, *supra* note 17, at 719; Hamdi v. Rumsfeld, 542 U.S. 507, 519, 524 (2004).

271. *In re* Gault, 387 U.S. 1, at 27 (1996) ("[H]owever euphemistic the title, a 'receiving home' or an 'industrial school' for juveniles is an institution of confinement in which the child is incarcerated . . . ."); *see also Hamdi*, 542 U.S. at 530 ("[C]ommitment for *any* purpose constitutes a significant deprivation of liberty that requires due process protection . . . .") (citing Jones v. United States, 463 U.S. 354, 361 (1983)).

272. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, at 41 n.8 (1981) (Blackmun, J., dissenting).

273. *In re Gault*, 387 U.S. at 36 (citing the "awesome prospect of incarceration").

274. Vitek v. Jones, 445 U.S. 480, 491 (1980) ("[C]ommitment to a mental hospital produces 'a massive curtailment of liberty.'") (citation omitted).

275. Turner v. Rogers, 131 S. Ct. 2507, 2518 (2011) ("[A]n indigent defendant's loss of personal liberty through imprisonment . . . lies 'at the core of the liberty protected by the Due Process Clause.'") (citing Foucha v. Louisiana, 504 U.S. 71, 80 (1992)).

276. Preventive detention is employed not to punish a past act, but to forestall a future danger or secure another governmental interest. Cole, *supra* note 17, at 699–705. Mandatory pre-hearing detention falls within this category. Its purposes are twofold: to secure presence at the removal hearing and prevent the commission of further crimes. Demore v. Kim, 538 U.S. 510, 518–20 (2003). Immigration detention—even for mandatory detainees who have committed prior crimes—cannot by law be punishment. Zadvydas v. Davis, 533 U.S. 678, 682 (2001); Peter Schuck, *INS Detention and Removal: A White Paper*, 11 GEO. IMMIGR. L.J. 667, 671 (1997).

277. Klein & Wittes, *supra* note 20, at 186–89, 191.

278. *See* United States v. Salerno, 481 U.S. 739, 742, 746 (1987) ("When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner.") (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)); Kansas v. Hendricks, 521 U.S. 346, 352–53 (1997) (Kansas civil com-

process has become increasingly normalized by statute; for example, when Congress recently enacted an indefinite preventive-detention scheme for alleged terrorist supporters, it provided appointed counsel to detainees at their military detention hearing.[279]

Thus, whether one views mandatory immigration detention as civil detention, preventive detention, or (accurately) both, the prospect of incarceration for months or years strongly supports a right to appointed counsel at the detention hearing. The detained immigrant suffers physical confinement.[280] The economic effect on detainees and their families from loss of work is severe.[281] The human cost of separation is "self-evident,"[282] and some detainees lose their children at custody hearings for failure to appear.[283]

That said, criminal pretrial detention is the one subset of preventive detention in which courts have yet to find a constitutional right to counsel at the detention hearing (i.e., bail hearing). Because pretrial immigration detention most resembles pretrial criminal detention, in that both pose a potential cascading constitutional deprivation, I address the relationship here.[284]

First, I argue to harmonize the due process treatment of mandatory immigration detention with the mid-twentieth century conceptualization of the criminal right to appointed counsel under both the Fifth and Sixth

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mitment of sex offenders follows hearing at which statutorily appointed counsel was provided, among other protections). Conversely, in *Boumediene*, the Court noted the absence of counsel in Guantanamo proceedings, and the detainees' concomitant inability to find or present evidence challenging detention, in holding the processes an inadequate substitute for *habeas*. Boumediene v. Bush, 553 U.S. 723, 781–85 (2008), (citing *Mathews*, 424 U.S. at 335).

279. NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2012, H.R. REP. NO. 112–329, at 269–270 (2012) (Conf. Rep.), *available at* http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt329/pdf/CRPT-112hrpt329-pt1.pdf.

280. Often, this is in a jail alongside criminal detainees. SCHRIRO, *supra* note 3, at 2. But the deprivation is the same even inside newer immigration facilities, akin to lower-security prisons, that contain less restrictive conditions inside their fence. *See* Mark Noferi, *Making Civil Immigration Detention "Civil": Defining the Emerging Civil Detention Paradigm*, 27 J. CIV. R. & ECON. D. (forthcoming 2013). The collateral effects of loss of work and contact with family are the same. *Id.*

281. Gerstein v. Pugh, 420 U.S. 103, 114 (1975) ("Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships."); Legomsky, *supra* note 3, at 541–42; *see also* Jonathan Zweig, Note, *Extraordinary Conditions of Release Under the Bail Reform Act*, 47 HARV. J. ON LEGIS. 555 (2010) (discussing the hardships bail imposes on pretrial defendants).

282. Legomsky, *supra* note 3, at 541.

283. *See* Seth Freed Wessler, *Thousands of Kids Lost from Parents in U.S. Deportation System*, COLORLINES (Nov. 2, 2011, 8:00 AM), http://colorlines.com/archives/2011/11/thousands_of_kids_lost_in_foster_homes_after_parents_deportation.html.

284. *Cf.* Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 390–92 (2006) (procedural similarities of criminal and immigration proceedings).

Amendments, before *Gideon* was decided.[285] Those academics and advocates arguing for appointed counsel similarly emphasized the deprivation of liberty at stake at a pretrial criminal bail hearing.[286]

The statutory provision of appointed counsel at a bail hearing—in the federal system, explicitly citing those academics and advocates—codified their concerns into law, but it partially mooted their development as a constitutional matter.[287] As the Sixth Amendment right to counsel developed and expanded to include any "critical stage," and as the Fifth Amendment receded into the background of criminal appointed counsel analysis, the question of whether either amendment requires counsel at a bail hearing took on less practical importance.[288] Moreover, as Justice Thomas has pointed out, the Sixth Amendment protects trial rights, and liberty interests alone "are protected by other constitutional guarantees."[289] (The impact of detention on trial rights will be considered in the next section).

Still, even under its Sixth Amendment jurisprudence, the Court is moving closer to a right to counsel at a bail hearing, or at least towards recognizing that liberty restrictions factor in its appointed counsel analy-

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285. *See* Kanstroom, *supra* note 8, at 1470 ("Sixth Amendment right-to-counsel jurisprudence . . . has never been fully independent from due process ideas . . . Indeed . . . the modern Sixth Amendment right-to-counsel idea is best viewed as a subsidiary category of broader norms.").

286. "Soon after arrest . . . a lawyer should be available to explain the charge, to investigate the facts, to *prevent unreasonable detention and unjustified bail* . . . ." N.Y. BAR ASS'N. SPECIAL COMM. TO STUDY DEFENDER, EQUAL JUSTICE FOR THE ACCUSED 23 (1959) [hereinafter EQUAL JUSTICE FOR THE ACCUSED] (emphasis added); *see also* REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 58–89 (1963) [hereinafter REPORT OF THE AG] (examining criminal bail practices); *id.* at 68–69 (listing among "punitive consequences" of pre-trial detention the deprivation of liberty and poor conditions); *id.* at 76 (criticizing "initial bail decisions . . . made in the absence of counsel representing accused's interests").

287. *See* FED. R. CRIM. P. 44 advisory committee's note (1966 Amendment) (citing, EQUAL JUSTICE FOR THE ACCUSED, *supra* note 286.) A growing number of states and localities followed the federal government's lead. Ten states, plus the District of Columbia, statutorily guarantee counsel at a criminal bail hearing. *See* Colbert, *supra* note 30, at 389 (noting that the following states statutorily guarantee counsel at a criminal bail hearing: California, Connecticut, Delaware, Florida, Hawaii, Maine, Massachusetts, North Dakota, Vermont, Wisconsin). Several additional states also guarantee counsel in about three out of every four localities where an indigent defendant first appears following arrest. *Id.* Only ten states deny appointed counsel at a bail hearing statewide. *Id.* at 386.

288. In *Gerstein v. Pugh*, the Supreme Court held that counsel was not required at a probable cause hearing, and suggested in *dicta* that courts might also determine bail then. Gerstein v. Pugh, 420 U.S. 103, 123–24 (1975) (probable cause determination "may be incorporated into the procedure for setting bail or fixing other conditions of pretrial release.") (citation omitted). *Gerstein* thus "led many to assume that counsel is not required at bail hearings either." Alissa Pollitz Worden, Andrew Lucas Blaize Davies & Elizabeth K. Brown, *A Patchwork of Policies: Justice, Due Process, and Public Defense Across American States*, 74 ALB. L. REV. 1423, 1433 (2010).

289. Rothgery v. Gillespie Cty., 554 U.S. 191, 235 (2008) (Thomas J., dissenting).

sis. Its narrow holding, in *Rothgery v. Gillespie County* in 2008, was that the Sixth Amendment right to counsel attaches at a reasonable time following a defendant's first appearance before a judicial officer at which he is informed of the charge and "restrictions are imposed on his liberty."[290] *Rothgery* did not rule on whether a bail hearing constitutes a "critical stage" to Sixth Amendment trial rights,[291] let alone whether and when liberty itself triggers appointed counsel. Yet its characterization of pretrial detention as "adversarial" is consonant with due process analysis that considers both deprivation of liberty and the adversarial nature of proceedings to support appointed counsel.[292]

The Court's Sixth Amendment jurisprudence is not necessary to a Fifth Amendment right to counsel here. Several cases have found such a right based on deprivation of liberty alone.[293] But Sixth Amendment jurisprudence supports a right to appointed counsel to pre-hearing immigration detainees under the first *Mathews* factor.

2. Impact of Detention on Fundamental Fairness of Underlying Removal Proceedings

Moreover, pre-hearing detention without counsel, in cascading fashion, impacts the fundamental fairness of the underlying proceedings, which in turn implicates the liberty interests affected by deportation.[294] Pre-*Gideon* academics and advocates similarly envisioned that a criminal right to appointed counsel would recognize these trial impacts of detention.[295] As they argued, detention without counsel impedes the ability to

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290. *Id.* at 194. *See generally id.* at 205–10.

291. *Id.*; *see also* Colbert, *supra* note 30, at 341–42 (noting that *Rothgery* supports the right to counsel at bail hearing); Colbert, *supra* note 21, at 17–20.

292. Turner v. Rogers, 131 S. Ct. 2507, at 2520 (2011) (citing Johnson v. Zerbst, 304 U.S. 458, 462–463 (1938)).

293. *E.g.*, *In re* Gault, 387 U.S. 1, at 27 (1996).

294. INS v. St. Cyr, 533 U.S. 289, 322 (2001) ("Preserving the . . . right to remain in the United States may be more important to the [noncitizen criminal] client than any potential jail sentence."). Notably, *Padilla's* focus on the severity of deportation adds little to the liberty analysis, since deportation (at least of an LPR) was already considered a "weighty" liberty interest. *Compare* Padilla v. Kentucky, 130 S. Ct. 1473, 1483 (2010) ("Preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence.") (quoting *St. Cyr*, 533 U.S. at 323), *with* Landon v. Plasencia, 459 U.S. 21, 34 (1982). Furthermore, viewing deportation as something approaching punishment would not transform pre-deportation detention into punishment, as criminal pretrial detention is already governed by due process. Bell v. Wolfish, 441 U.S. 520 (1979).

295. EQUAL JUSTICE FOR THE ACCUSED, *supra* note 286, at 23; REPORT OF THE AG, *supra* note 286, at 58 (the "concern for pre-trial liberty" encompasses both "interests in individual justice and the viability of the adversary system"; it is "more than a concern that persons not be punished before conviction," since a pretrial detainee "may also be deprived of opportunity to make adequate defense to the charges against him.") (internal

undertake the "activities entailed in preparing for and conducting a defense."[296] The detainee "has no ability . . . to obtain evidence,"[297] whether records or witnesses.[298] Moreover, the detained defendant lacks the ability to access a lawyer to plan strategy for the case.[299] Indeed, the Supreme Court has recognized these concerns in the criminal realm, but presumed any deprivation would be insubstantial since delay would be minimal—not the case in immigration proceedings, where no speedy trial guarantees apply.[300] *Rothgery* impliedly affirmed those concerns by noting that the defendant was "headed for trial and need[ed] to get a lawyer working."[301] Indeed, the Bail Reform Act codified these concerns in its exception for temporary pretrial release to the extent "necessary for preparation of the person's defense."[302]

Thus, it is increasingly accepted that pretrial criminal detention—even with appointed counsel—leads to more wrongful convictions.[303] Empirical evidence supports this claim as well. Pretrial detention leads to

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quotations omitted). Unlike deprivation of liberty alone, such impacts fall squarely within Sixth Amendment protections of trial rights.

296. EQUAL JUSTICE FOR THE ACCUSED, *supra* note 286, at 24; *see also* William M. Beaney, *Right to Counsel Before Arraignment*, 45 MINN. L. REV. 771, 780–81 (1961) (noting that the delay in ability of defendant to access counsel implicates Due Process fundamental fairness).

297. Yale Kamisar, *The Right to Counsel and the Fourteenth Amendment; A Dialogue on "The Most Pervasive Right" of an Accused*, 30 U. CHI. L. REV. 1, 62 (1962) [hereinafter Kamisar, *Right to Counsel*] (citing Robert L. Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293, 297 (1960));Yale Kamisar, Betts v. Brady *Twenty Years Later: The Right to Counsel and Due Process Values*, 61 MICH. L. REV. 219, 227 (1962) [hereinafter Kamisar, *Twenty Years Later*]; *see also* Beaney, *supra* note 296, at 780.

298. REPORT OF THE AG, *supra* note 286, at 71 ("Confinement of the defendant" pretrial may "prevent adequate preparation for trial" and "not infrequently . . . seriously inhibits the maintenance of an adequate defense"); *id.* ("[I]f witnesses are to be located, interviewed, and brought to the attention of counsel, these functions must be performed, if at all, by the accused, himself."); *id.* (pre-trial detention also "impedes the lawyer's contacts with his client," as detention facilities are often in remote locations, with facilities "not conducive to effective consultation."); Kamisar, *Right to Counsel*, *supra* note 297, at 63.

299. EQUAL JUSTICE FOR THE ACCUSED, *supra* note 286, at 24, 35; *see also* Kamisar, *Twenty Years Later*, *supra* note 297, at 227–28 ("[W]hen the average defendant is placed in the witness chair . . . he has been set adrift in an uncharted sea with nothing to guide him . . . [h]ow much more frightening, more perilous, is the predicament of the defendant . . . who is 'going it alone' all the way?") (emphases omitted).

300. Gerstein v. Pugh, 420 U.S. 103, 123 (1975) ("pretrial custody may affect to some extent the defendant's ability to assist in preparation of his defense"); *see also* Stack v. Boyle, 342 U.S. 1, 4 (1951); Powell v. Alabama, 287 U.S. 45, 57 (1932) (noting that the stage from defendant's arraignment to beginning of trial is "the most critical period of the proceedings . . . when consultation, thorough-going investigation and preparation" are essential for guaranteeing fair trial).

301. Rothgery v. Gillespie Cty., 554 U.S. 191, 210 (2008).

302. 18 U.S.C. § 3142(i) (2006).

303. Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1130 (2005).

increased rates of conviction; for example, in New York City felony cases, defendants detained continuously to disposition had an 84 percent chance of conviction, compared to a 57 percent chance for those released.[304] Groundbreaking studies by the Manhattan Bail Project in the 1960s showed defendants detained pre-trial were more likely to be convicted in every charge category.[305] Additionally, pretrial detention increases the severity of conviction, as it is the "strongest predictor of incarceration."[306]

The cascading effect of pretrial detention is conceptually similar in immigration removal proceedings, as the *Demore* dissent recognized.[307] Immigrant detainees face similar if not worse barriers to pretrial preparation. Most crucially, the ability to collect evidence to rebut wrongful detention and deportation is hampered.[308] Indeed, immigrant detainees are similar to the *Rothgery* detainee, who needed to procure criminal records to rebut the existence of the predicate crime for his charged offense.[309]

Moreover, because no counsel is appointed at *any* point, the impact of pretrial detention on hearing rights is more evident and more severe. Whereas criminal pretrial detention, even with counsel, results in a 27 percent increase in the chance of conviction, immigration pre-hearing detention results in 97 percent of detained, unrepresented immigrants losing their cases.[310] Moreover, an immigrant detainee faces a near-permanent inability to *secure* counsel, which impacts his proceedings more than a criminal pretrial detainee's relative inability to assist counsel that will at some point be appointed.[311] Transfers of immigrants to remote locations further exacerbate this inability.[312] This "vicious circle" between access to release and access to representation is exceptionally damaging.[313]

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304. Mary T. Phillips, PRETRIAL DETENTION AND CASE OUTCOMES, PART 2: FELONY CASES 58 (March 2008), *available at* http://www.cjareports.org/reports/felonydetention.pdf; *see also* TIMOTHY C. HART & BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 1996 24 (1999).

305. Charles E. Ares, Anne Rankin, & Herbert Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole*, 38 N.Y.U. L. REV. 67, 84–85 (1963); *see also* Anne Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U. L. REV. 641, 641–655 (1964).

306. Marian R. Williams, *The Effect of Pretrial Detention on Imprisonment Decisions*, 28 CRIM. JUST. REV. 299, 312 (2003) (noting that defendants detained prior to case disposition were over six times more likely to be incarcerated).

307. "[D]etention prior to entry of a removal order may well impede the alien's ability to develop and present his case on the very issue of removability." Demore v. Kim, 538 U.S. 510, 554 (2003) (Souter, J., dissenting) (noting this "additional interest in avoiding confinement").

308. *Id.* at 542.

309. Rothgery v. Gillespie Cty., 554 U.S. 191, 195–96 (2008) (noting that charges were dropped once defendant obtained counsel who could procure records).

310. NYIRS, *supra* note 6, at 363–64.

311. Markowitz, *supra* note 57, at 556.

312. *See supra* Part I.A.3.

313. NYIRS, *supra* note 6, at 377.

These barriers to representation exacerbate the aforementioned barriers to pretrial preparation. Worse, *pro se* immigration detainees often must file a Freedom of Information Act request for their government records, since no *Brady* disclosures occur as in a criminal case.[314] Even worse, translation is severely inadequate.[315] Finally, no exception exists for temporary pretrial release to help prepare a defense like that provided by the criminal Bail Reform Act.

B. *Risk of Erroneous Deprivation at the* Joseph *Hearing*

Without appointed counsel, the risk is high of an erroneous deprivation of those cascading interests (or a "wrongful detention and deportation"). Erroneous detention decisions do occur at *Joseph* hearings, as shown by the substantial minority of immigrants who have won *Joseph* claims (tellingly, all of whom somehow secured counsel).[316] Erroneous deportation decisions involving mandatorily detained, unrepresented immigrants also undoubtedly occur. As noted above, detained and unrepresented immigrants are deported 97 percent of the time. Although some, perhaps even many, of these cases involving the mandatorily detained may be meritless, the discrepancy between that figure and the 74 percent success rate for non-detained, represented immigrants simply cannot be explained by a "selection effect" alone.

Before analyzing the characteristics of removal proceedings that increase the risk of wrongful detention and deportation, I briefly set out here an overview of the seminal cases providing appointed counsel in the criminal context. Today, in the context of due process, these arguments are considered under *Mathews'* second factor. Then, the arguments were considered under a blend of Fifth Amendment "fundamental fairness" and the Sixth Amendment.[317]

In its 1932 decision in *Powell v. Alabama*, the Supreme Court held that due process entitled indigent criminal defendants to "effective appointment" of counsel.[318] However, the *Powell* Court explicitly declined to create a categorical rule for appointed criminal counsel.[319] The Court held in 1938 that the Sixth Amendment required appointed counsel in federal criminal cases,[320] and a few years later in *Betts v. Brady*, the Court adopted a "case-by-case approach" to appointed counsel in state criminal

314. *See supra* note 141.
315. JAILED WITHOUT JUSTICE, *supra* note 4, at 34.
316. *See* Dona, *supra* note 118 (manuscript at 2–4).
317. *See* Kanstroom, *supra* note 8, at 1470.
318. 287 U.S. 45, 71 (1932).
319. *Id.*
320. Johnson v. Zerbst, 304 U.S. 458, 462 (1938).

cases.[321] The *Betts* "case-by-case" rule survived until 1963, when the Court in *Gideon v. Wainwright* found the Sixth Amendment right to counsel to be so fundamental that the Fourteenth Amendment incorporated it against states.[322] (In immigration removal proceedings today, as noted, there is only a *Betts*-like "case-by-case" approach to appointed counsel.)

Three major principles emerged from these criminal cases that continued into the Court's analysis of the risk of wrongful civil incarceration. First, the Court emphasized the key role of counsel in providing analysis, advocacy, and advice, particularly in complex proceedings. Second, the Court noted that the adversarial nature of proceedings against government counsel exacerbated those civil defendants' need for comparable advocacy. Third, that need is exacerbated again where a vulnerable defendant is particularly unable to effectively represent himself. I address each in turn below, with a fourth subsection addressing particular procedural deficiencies of a *Joseph* hearing which exacerbate the risk of wrongful detention and deportation.

1. Complexity of Litigating Immigration Proceedings

The advocacy role of counsel, articulated by the *Gideon-Powell* line of cases, is particularly crucial in minimizing risk of error in complex proceedings such as immigration proceedings. *Gideon* and *Powell* emphasized the lawyer's key role in performing the skills commonly thought of as lawyer's skills: conducting legal analysis,[323] preparing a defense,[324] conducting a factual investigation,[325] and testing evidence.[326]

Moreover, the Court has repeatedly distinguished legally and factually complex proceedings, necessitating the skills identified by *Gideon* and *Powell*, from inquiries where counsel would make little difference. For example, the Court has distinguished complex legal analysis where "an

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321. 316 U.S. 455, 461–62 (1942) (noting that since due process was "more fluid" than other constitutional provisions, the lack of categorically appointed counsel did not offend notions of "fundamental fairness").

322. Gideon v. Wainwright, 372 U.S. 335, 342–45 (1963).

323. "Even the intelligent and educated layman has small and sometimes no skill in the science of law . . . [w]ithout [counsel], though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." *Powell*, 287 U.S. at 69.

324. "He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one." *Id.*; *see also Gideon*, 372 U.S. at 345.

325. *Powell*, 287 U.S. at 63 n.1 ("It is manifest that there is as much necessity for counsel to investigate matters of fact, as points of law, if truth is to be discovered.") (citation omitted).

326. "He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible." *Id.* at 69; *see also Gideon*, 372 U.S. at 345.

arguable defense would be uncovered only by a lawyer" from simple legal analysis such as an undisputed conviction.[327] The Court has given more weight to legal analysis than to factual questions.[328] And the Court has distinguished factual issues necessitating significant factual investigation,[329] evidentiary complexity,[330] evidentiary testing in trial-type hearings,[331] or the advocacy skills necessary to present disputed facts from simple, "straightforward" factual questions such as indigence.[332] As such, representation by a non-lawyer, e.g., a social worker, has sufficed only where proceedings are not particularly complex or do not particularly necessitate a lawyer's advocacy skills.[333]

The legal complexity of immigration law is well recognized[334] and ever-present at a *Joseph* hearing. Each of the three *Joseph* issues—the immigration classification of a conviction, the immigration impact of a non-conviction disposition, and citizenship—involves complex statutory analysis. Indeed, for a *pro se* detainee to adequately argue that his conviction is not an aggravated felony he must wade through complex BIA

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327. *See* Gagnon v. Scarpelli 411 U.S. 778, 787, 789 (1972) ("In most cases, the probationer or parolee has been convicted of committing another crime or has admitted the charges against him."); *see also* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 32 (1981) (noting that the case "presented no specially troublesome points of law, either procedural or substantive"). *Gagnon* provided for a case-by-case approach a la *Betts v. Brady*, as did *Lassiter*. *Lassiter*, 452 U.S. at 25–27; *Gagnon*, 411 U.S. at 790–91.

328. *See* Turner v. Rogers, 131 S. Ct. 2507, 2519 (2011) (noting "sufficiently straightforward" factual question of indigence); *Gagnon*, 411 U.S. at 787 (distinguishing legal issue of conviction from factual mitigating evidence counseling against probation revocation).

329. *Gagnon*, 411 U.S. at 787 (noting that mitigating evidence is often "so simple as not to require either investigation or exposition by counsel.").

330. *See Lassiter*, 452 U.S. at 29, 32 (noting that a parental termination hearing is "not likely to produce difficult points of evidentiary law"); *Gagnon*, 411 U.S. at 786–87 (noting the difficulty of "offering or dissecting of complex documentary evidence").

331. *See Gagnon*, 411 U.S. at 786–87 ("[T]he unskilled or uneducated probationer or parolee may well have difficulty in presenting his version of a disputed set of facts where the presentation requires the examining or cross-examining of witnesses . . . ."). This is so "[d]espite the informal nature of the proceedings and the absence of technical rules of procedure or evidence." *Id.*

332. *Turner*, 131 S. Ct. at 2520 (distinguishing an "unusually complex case where a defendant 'can fairly be represented only by a trained advocate' ") (quoting *Gagnon* 411 U.S. at 788).

333. *Id.* at 2519 (finding that a non-legal assistant might be constitutionally sufficient) (citing Vitek v. Jones, 445 U.S. 480, 499–500 (1980) (Powell, J. concurring) (noting that since psychiatric commitment is a medical issue, a licensed psychiatrist or other mental health professional's assistance might suffice)). *Turner* found that "substitute procedural safeguards" such as notice and opportunity to respond also might suffice. *Id.*

Notably, the *Turner* parties briefed and orally argued the impact of that case on the constitutional rights of immigrant detainees, but the Court ultimately omitted the issue in its written opinion. *See generally* Mark Noferi, Turner *Could Support Appointed Counsel for Immigrants*, N.Y. L.J., July 22, 2011, at 6.

334. Castro-O'Ryan v. INS, 847 F.2d 1307, 1312 (9th Cir. 1987) (comparing complexity of immigration law to the Tax Code).

provisions and circuit splits. He must research the nuances of the "categorical approach" and "modified categorical approach" to statutory analysis, ascertain whether his criminal statute is "divisible," and determine whether the applicable subcategory of the "aggravated felony" statute is "generic" or "specific" and necessitates a fact-specific inquiry.[335]

This complex statutory analysis, "closer to a many-layered archeological dig,"[336] is squarely within the lawyer's skills central to a fair trial.[337] It raises, as *Gideon* did, the question of how an uncounseled immigrant detainee could know whether he has a viable defense.[338] To the extent the Supreme Court has distinguished between complex and simple legal issues—for example, the loose "best interests of the minor" standard of family law[339]—the *Joseph* issues here easily qualify as complex. Further, the complex legal issues in *Joseph* hearings are far removed from the factual questions that predominated in cases where the Court found appointed counsel unnecessary, such as the facts of a parent-child relationship,[340] a medical evaluation of dangerousness,[341] or the "straightforward" factual determination of indigency.[342] Even if the Legal Orientation Program can provide some knowledge on legal issues, the immigrant lacks the advocacy skills to present the issues effectively.[343]

Moreover, this complex legal analysis is intertwined with the increasing factual complexity of *Joseph* hearings. First, there is the factual complexity inherent to analyzing a record of criminal conviction with multiple components.[344] Further, the increasing relitigation of facts of conviction, necessitating the collection and presentation of evidence at a trial-type *Joseph* or *Silva-Trevino* hearing, may add evidentiary complexity

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335. *See supra* Section I.C.1.a.

336. Kim v. Gonzales, 468 F.3d 58, 63 (1st Cir. 2006).

337. Powell v. Alabama, 287 U.S. 45, 71 (1932); *see also ABA Resolution on Civil Right to Counsel*, 15 TEMP. POL. & CIV. RTS. L. REV. 507, 509 (2006).

338. *Powell*, 287 U.S. at 69–70. *See generally* Daniel Curry, Note, *The March Toward Justice: Assessing the Impact of* Turner v. Rogers *on Civil Access-To-Justice Reforms*, 25 GEO. J. LEGAL ETHICS 487, 493–95 (2012) (arguing, citing this author, that *Turner* supports right to counsel for immigrant detainees).

339. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 24 n.4, 29, 32 (1981).

340. *Id.* at 24, 29.

341. Vitek v. Jones, 445 U.S. 480, 499–500 (1980) (Powell, J. concurring).

342. Turner v. Rogers, 131 S. Ct. 2507, 2511, 2519 (2011).

343. Mark Brown raised the question whether the provision of information short of full legal representation might, under *Mathews*, mitigate the risk of an erroneous deprivation. Mark C. Brown, Comment, *Establishing Rights Without Remedies? Achieving an Effective Civil* Gideon *by Avoiding a Civil* Strickland, 159 U. PA. L. REV. 893, 902–03 (2011) (citing *pro se* clinics, "lawyer-of-the-day" programs, assistance hotlines, etc.) I argue here that full representation is constitutionally necessary for mandatory detainees, for the reasons outlined above. *See also infra* Section III.B.3 (detailing particular vulnerabilities of detained immigrants).

344. *See* Dona, *supra* note 118.

necessitating trial advocacy skills.[345] The skill of "testing evidence" has distinguished lawyer from layman since *Powell*.[346] It is no less important where informal rules of evidence apply, such as in immigration court.[347]

Indeed, the procedural informality of the unregulated yet trial-like *Joseph* hearing especially frustrates the detainee's ability to effectively present his claims without counsel.[348] The hearing, if held at all, may only be in English.[349] If the detainee can collect evidence, presenting that evidence by telephone or video may prove difficult.[350] The judge retains discretion to hear witnesses or not.[351] It is difficult without discovery to test the validity of government evidence, even though it may include unofficial or uncertified records.[352]

One counter-argument is that counsel could be provided on a case-by-case basis, since not every *Joseph* legal and factual issue will be complex. Indeed, many mandatory detention challenges will be fruitless.[353] Still, the Court has *never* denied a categorical right to appointed counsel where *both* incarceration and routine complexity exist.[354] Even the most common *Joseph* determinations—those for aggravated felonies or crimes involving moral turpitude—will routinely require complex statutory analysis and case law research. It is rare that immigration law specifically references a crime (for example, that "murder" constitutes an "aggravated felony").[355]

2. Adversarial Proceedings Against Government Counsel

Further, the asymmetry of *pro se* detainees litigating these complex proceedings against trained government counsel exacerbates the risk of an erroneous decision. The Court has affirmed the special importance of a lawyer's advocacy skills in adversarial proceedings against government

345. *See infra* Section I.C.1; *cf.* Das, *supra* note 3, at 1732.

346. *See* Powell v. Alabama, 287 U.S. 45, 69 (1932) (noting that a layman is "unfamiliar with the rules of evidence"); *cf.* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 29 (1981); Gagnon v. Scarpelli, 411 U.S. 778, 787 (1972).

347. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 533–34 (2004) (noting that hearsay may be used, so long as "fair opportunity for rebuttal were provided"); *In re* Gault, 387 U.S. 1, at 11 n.7 (1996) (juvenile proceedings include hearsay, but providing for appointed counsel).

348. *See generally supra* Section I.B.2.

349. ICOP, FUNDAMENTAL FAIRNESS, *supra* at 128, at 9, 11.

350. *See generally supra* Section I.B.2.

351. DEP'T OF JUSTICE, *supra* note 123, at 9.3(e)(vi).

352. Dona, *supra* note 118 (manuscript at 15).

353. Markowitz, *supra* note 15, at 1354, 1359–60 (noting that in many simple non-criminal deportations "there is little that an attorney would be able to do").

354. *Cf.* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 26, 31–32 (1981) (finding only case-by-case right where incarceration was not at risk, and the complexity of the proceedings "could be, but would not always be" great).

355. 8 U.S.C. § 1101(a)(43)(A) (2006).

counsel.[356] *Turner*, for example, explicitly distinguished the potential "asymmetry of representation" in private child support cases, where the parent seeking support is also typically unrepresented, from government efforts through "experienced and learned counsel" to deprive a defendant of liberty.[357]

The adversarial nature of the *Joseph* hearing against DHS counsel, trained in immigration law and advocacy skills, stacks the deck further against the *pro se* detainee.[358] The American Bar Association (ABA) has recognized the adversarial nature of removal proceedings.[359] Even in civil litigation, studies have unsurprisingly shown that an unrepresented party's chances drop by approximately half when facing a lawyer.[360]

3. Detained Immigrants as a Vulnerable Population

Third, uncounseled immigrant detainees are particularly vulnerable to an erroneous decision. The Court has affirmed a lawyer's importance to an especially vulnerable litigant,[361] such as a juvenile,[362] mentally ill patient,[363] or even a parent with "little education" and "uncommon difficulty in dealing with life" for which a hearing is "a distressing and disorienting situation."[364] Generally, the court has considered whether the respondent is "capable of speaking effectively for himself."[365] Although categorically vulnerable populations like juveniles and the mentally ill have received

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356. Gideon v. Wainwright, 372 U.S. 335, 344 (1963) ("That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the wide-spread belief that lawyers in criminal courts are necessities, not luxuries."); *see also* Johnson v. Zerbst, 304 U.S. 458, 462–63 (1938).

357. Turner v. Rogers, 131 S. Ct. 2507, 2520 (2011) (citing *Johnson*, 304 U.S. at 462–63).

358. *Id.* at 2520.

359. AMERICAN BAR ASS'N, *supra* note 53, at 195 n.7 (removal proceedings are as "similarly complex, adversarial, and consequential" as criminal proceedings) (citing AMERICAN BAR ASSOCIATION, REPORT TO THE HOUSE OF DELEGATES 5 (2006)); *see also ABA Resolution on Civil Right to Counsel*, *supra* note 337, at 521 (the "emphasis of the right [to counsel] ... is on the adversarial nature of the process, not what the tribunal is called.").

360. Debra Gardner, *Justice Delayed Is, Once Again, Justice Denied: The Overdue Right to Counsel in Civil Cases*, 37 U. BALT. L. REV. 59, 71–72 & nn.111–12 (2007); Russell Engler, *Connecting Self-Representation to Civil* Gideon: *What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 49 (2010).

361. "If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect." Powell v. Alabama, 287 U.S. 45, 69 (1932).

362. *In re* Gault, 387 U.S. 1, 35–42 (1996).

363. Vitek v. Jones, 445 U.S. 480, 496–97 (1980).

364. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 30 (1981).

365. Gagnon v. Scarpelli, 411 U.S. 778, 790–91 (1972).

special solicitude under *Mathews*,[366] vulnerability has not been limited to facial incapacity.[367]

Unfortunately, the extreme complexity of an immigration detention hearing must often be navigated by a population least able to do so.[368] Immigration detainees are most likely indigent foreign nationals,[369] and language barriers can result in detainees unknowingly waiving rights.[370] Courts have generally held that due process does not require an interpreter;[371] however, this is extremely problematic since even with interpreters misunderstandings are common.[372] A counsel's guidance and preparation may mitigate those effects.[373]

4. Particular Procedural Deficiencies of *Joseph* Hearings and Review

Moreover, the risk of wrongful detention at a *Joseph* hearing is compounded by procedural deficiencies. The initial detention determination is made by a non-lawyer on a paper record, without any requirement of lawyer review, despite its legal and factual complexity. Courts have looked unfavorably upon detention without court review, let alone detention by a non-lawyer without executive branch lawyer review.[374]

Review of the *Joseph* decision also suffers from procedural infirmity. If the detainee seeks to appeal it, its informality makes appeal difficult, as hearings are usually not recorded,[375] and decisions are usually rendered orally (unless the detainee knows to request otherwise).[376] Moreover, BIA

366. *See supra* notes 295–98 and accompanying text.

367. *Lassiter*, 452 U.S. at 30.

368. Richard L. Abel, *Practicing Immigration Law in Filene's Basement*, 84 N.C. L. REV. 1449, 1488 (2006); Jennifer Barnes, *The Lawyer-Client Relationship in Immigration Law*, 52 EMORY L.J. 1215, 1217–18 (2003); Markowitz, *supra* note 57, at 551 (noting that 52 percent of "the foreign-born population are limited English-proficient.").

369. Markowitz, *supra* note 57, at 548.

370. Davis, *supra* note 18, at 149–50.

371. *Id.* at 149 n.142; Tomas, 19 I. & N. Dec. 464, 465 (B.I.A. 1987).

372. Davis, *supra* note 18, at 149.

373. Werlin, *supra* note 23, at 420–21.

374. Indeed, one district court invalidated the Adam Walsh Act civil commitment scheme on this ground. *See* United States v. Edwards, 777 F. Supp. 2d 985, 993–95 (E.D.N.C. 2011) (declaring Adam Walsh Act unconstitutional in part because initial determination to detain is made by layperson). Additionally, the *Boumediene* Court distinguished between detention by executive order, and incarceration after a criminal conviction, which "occurs after a judicial hearing before a tribunal disinterested in the outcome and committed to procedures designed to ensure its own independence." It implied the latter is more consonant with procedural due process principles. Boumediene v. Bush, 553 U.S. 723, 781–83 (2008) (reviewing adequacy of substitute for *habeas* in accordance with procedural due process principles) (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)); *see also* Sayed, *supra* note 17, at 1867–68 & nn. 110–11, 1871–72.

375. DEP'T OF JUSTICE, *supra* note 123, at 9.3(e)(iii).

376. *Id.* at 9.3(e)(vii).

review is cursory, the court of appeals' review is deferential, and DHS can detain the immigrant while it appeals the bond determination.[377] Since the deportation case proceeds apace, harm to litigating the underlying deportation can be irredeemable.[378]

Lastly, the high burden at a *Joseph* hearing ensures that mandatory detainees with substantial arguments against mandatory detention will lose *Joseph* hearings and remain detained.[379] (Even where the detainee wins, the government can automatically stay release of the detainee while it appeals.)[380]

One could argue that these procedural deficiencies mean that counsel would make little difference. After all, so the argument goes, if very few mandatory detainees win Joseph hearings because Joseph hearings are so hard to win, wouldn't the cost of counsel outweigh any benefit? That said, the cascading constitutional deprivation here encompasses the ultimate deportation hearing. As Justice Souter argued, the "heightened standard of proof" at a deportation hearing "will not mean all that much when the INS can detain, transfer, and isolate aliens away from their lawyers, witnesses, and evidence."[381] Moreover, it would pervert Mathews to allow greater risk of wrongful determinations where the risk is already high. It seems circular, if not pernicious, to adopt a rule that would encourage the government to deny some procedural safeguards with one hand so as to strengthen its arguments to deny other procedural safeguards with the other.

C. *Government's Interests*

The third factor to consider is the government's interest in using current, less formal procedures, rather than providing appointed counsel, so as to minimize costs and preserve administrative efficiency and flexibility. I argue here the government's interest is slight, especially where the government seeks itself to expand the formality of immigration proceedings, and provides appointed counsel in even more emergent contexts such as wartime.[382] I argue as well, as others have, that *Mathews* analysis

377. Kaufman, *supra* note 14, at 141–44.

378. Jorjani, *supra* note 151, at 108.

379. Joseph, 22 I. & N. Dec. 799, 800 (B.I.A. 1999); *see also* Bhargava, *supra* note 122, at 74–75 n.186.

380. Jorjani, *supra* note 151, at 119–20.

381. Demore v. Kim, 538 U.S. 510, 554 (2003) (Souter, J., concurring and dissenting).

382. In *Plasencia*, Justice O'Connor applied the *Mathews* test to immigration laws by stating that "it must weigh heavily in the balance that control over matters of immigration is a sovereign prerogative, largely within the control of the executive and the legislature." Landon v. Plasencia, 459 U.S. 21, 34 (1982). One reading of *Plasencia* is that plenary power principles presumptively tip the third *Mathews* factor towards the government, in immigra-

should also reflect non-quantifiable but legitimate government interests in fair and transparent proceedings for LPRs.[383]

1. Purported Informality Despite Increasing Formality

Courts considering appointed counsel claims have balanced *Gideon*'s concerns against government interests such as "informality, flexibility, and economy."[384] For example, a state's interests in the informality of non-adversarial probation revocation hearings, designed to consider the rehabilitative needs of a probationer, outweighed the other two *Mathews* factors.[385]

Regarding mandatory immigration detention, however, the government's move towards more formal, complex, and trial-like deportation proceedings belies any purported interest in informality and efficiency. At the Attorney General's direction, immigration judges in some circuits now hold additional "*Silva-Trevino* hearings" to evaluate additional criminal evidence, exacerbating an already backlogged process.[386] It seems the government's goal is to detain and deport as many immigrants as possible, no matter how long or how much evidence it takes.[387]

Secondly, the government's interest in informal and efficient immigration procedures carries far less weight inside the border than at the border. At the border, the government seeks to efficiently and securely prevent unlawful entry and remove unlawfully arriving aliens as quickly as possible. Inside the border, however, deportation proceedings for post-

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tion cases. Under that reading, though, there would appear little need for procedural due process analysis.

Lower courts applying due process to immigration laws have infrequently interpreted this language, and when doing so, have reached differing results. *Compare* Manwani v. U.S. Dep't of Justice, 736 F. Supp. 1367, 1376 n.18 (W.D.N.C. 1990) ("*Plasencia* also holds that proper constitutional analysis of procedural due process claims requires a traditional balancing of competing interests, not absolute deference to congressional legislation."), *with* Ferreras v. Ashcroft, 160 F. Supp. 2d 617, 630 (S.D.N.Y. 2001) (finding that petitioner's deprivation of liberty at detention hearing is subject to "constraints imposed by Congress pursuant to its constitutional authority over immigration matters").

383. The government's stated interests in pre-hearing mandatory detention—to secure the immigrant's presence at trial and prevent future dangerousness—support the substantive legitimacy of the detention, rather than the adequacy of the attendant procedures to detention. Cole, *supra* note 17, at 709; *see also* Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289, 345–50 (2008) (arguing that application of constitutional criminal protections would not undermine the government's fundamental interest in expulsion cases). That said, alternatives to detention would likely further those goals at much less cost. FREED BUT NOT FREE, *supra* note 82, at 3.

384. Gagnon v. Scarpelli, 411 U.S. 778, 788 (1972).

385. *Id.* at 787–88.

386. *See* Dadhania, *supra* note 188, at 354–55; Das, *supra* note 3, at 1674 n.18.

387. *See* Das, *supra* note 3, at 1738–41.

entry unlawful action already involve an individualized trial-type hearing presided over by a judge, against government counsel, with some due process protections.[388] These are the procedures for mandatory pre-hearing detainees. Indeed, government counsels routinely seek continuances to amend pleadings or obtain additional evidence[389]—again, as above, evidently to improve their chances of deporting more immigrants.

Third, if the government can now provide appointed counsel in wartime detention proceedings, it can provide appointed counsel in peacetime immigration proceedings. Al Qaeda supporters detained for waging war against the United States now receive militarily-appointed counsel in their preventive detention proceedings.[390] Congress and the Executive have provided this even though detention hearings may distract from soldiers' wartime duties.[391]

The exigencies of mandatory pre-hearing immigration detention are not more pressing than those facing the military in wartime. Civilly deporting long-time residents inside our borders is already more formalized and protracted than detaining enemies outside our borders. (For example, in *Hamdi*, the Court distinguished battlefield captures from decisions to *continue* detention, with the latter warranting more due process.)[392] DHS has already created an adjudication system for detention and removal, unlike some battlefield detention schemes.[393] Although plenary immigration power is derived from the executive's foreign policy and warmaking powers,[394] it cannot logically justify, on grounds of burden on the government, less due process in peacetime than the government currently provides in war.

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388. Kanstroom, *supra* note 8, at 1464–65.

389. *See* JAILED WITHOUT JUSTICE, *supra* note 4, at 23; BENSON & WHEELER, *supra* note 4, at 84.

390. NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2012, H.R. REP. NO. 112–329, at 269–70 (2012) (Conf. Rep.) (providing military appointed counsel in military hearings to, *inter alia*, those who "substantially supported" Al Qaeda), *available at* http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt329/pdf/CRPT-112hrpt329-pt1.pdf.

391. Middendorf v. Henry, 425 U.S. 25, 46 (1976) (finding that there is no due process right to counsel in summary court-martial proceedings, in part because for military personnel "time may be better spent than in possibly protracted disputes"); *see* JACK GOLDSMITH, POWER AND CONSTRAINT 175 (2012) (describing increased due process in wartime proceedings).

392. Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004).

393. For example, DHS trial attorneys already collect and produce evidence. *See id.* at 534 (finding fact-finding imposition minimal where "documentation regarding battlefield detainees already is kept in the ordinary course of military affairs").

394. *See id.*; Harisiades v. Shaughnessy, 342 U.S. 580, 587–88 (1952) (noting that power to deport derives from war powers). *See generally* Markowitz, *supra* note 383, at 305–06 & accompanying notes.

2. The Impact of Counsel on Costs, Efficiency, and Reduced Detention

A second government interest against providing appointed counsel is the cost of counsel. However, appointed counsel at a *Joseph* hearing may actually reduce the costs of immigration proceedings by increasing efficiency and reducing detention.

Preliminarily, the cost of appointed counsel to mandatory pre-hearing detainees is likely de minimis,[395] at least in comparison to the overall costs of detention itself. For example, a comparable preventive detention scheme—Minnesota's sex offender civil commitment program—spent 2.3 percent of its detention costs on counsel and administrative staff (both prosecutors and defenders).[396] 2.3 percent of ICE's detention costs (1.77 billion dollars in fiscal year 2010) would be 40 million dollars (and that would even encompass non-mandatory detainees).[397] Moreover, since most long-term detainees are concentrated in a few facilities, placing appointed counsel near targeted facilities would likely result in a large "bang for the buck."[398]

More fundamentally, any cost of appointed counsel would be countermanded by reduced costs of detention and increased court efficiency.[399] Detention is expensive and currently costs the government 122 dollars per day per detainee (44,500 dollars per year).[400] Because *Joseph* hearings typically resolve the case, appointed counsel upfront at the *Joseph* hearing might dramatically reduce detention costs and increase efficiency.[401]

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395. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 28 (1981).

396. In 1998, Minnesota estimated its total cost of sex offender civil commitment at approximately $17 million per year, with $320,000 of that allocated to counsel. MINNESOTA DEPARTMENT OF CORRECTIONS, CIVIL COMMITMENT STUDY GROUP, 1998 REPORT TO THE LEGISLATURE 21 (1998), *available at* http://www.doc.state.mn.us/publications/documents/Civil%20Commitment%20Study%20Group%20Report%20to%20the%20Legislature.PDF.

397. FREED BUT NOT FREE, *supra* note 82, at 3 & n.11. ICE, in the past, has spent .07 percent of its detention costs on providing detainees with legal rights information. ISOLATED IN DETENTION, *supra* note 63, at 5.

398. SCHRIRO, *supra* note 3, at 10 (noting that in 2009, 50 percent of detainees were held in 21 of the 300 ICE facilities).

399. *See* Cole, *supra* note 17, at 720; *cf.* Heeren, *supra* note 19, at 628 (arguing against mandatory detention on cost grounds). A pilot program providing unbundled representation at criminal bail hearings caused the pretrial detention population to drop from 50 percent over capacity to 20 percent below capacity. Douglas L. Colbert et al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1722–23 (2002).

400. *About the US Detention and Deportation System*, DETENTION WATCH NETWORK, http://www.detentionwatchnetwork.org/aboutdetention (last visited Aug. 10, 2011).

401. *See* Markowitz, *supra* note 15, at 1359 ("[I]f you are going to apply a right to appointed counsel, it makes good sense to do so at the outset of the proceeding for people with criminal removal charges."); Taylor, *supra* note 3, at 1697–98 (finding that brief consultation convinced some detainees to accept immediate deportation) (citing GENERAL

If a detainee wins the *Joseph* hearing, he will not only be released, saving the government money, but he will likely be one less case in the system.[402] Conversely, if he loses the *Joseph* hearing, his deportation may well be unavoidable.[403] In that circumstance, though, a lawyer might encourage him to accept deportation rather than litigating fruitless claims from detention, again saving the government money and increasing efficiency.[404]

3. Fairness and Transparency of Proceedings

The government's most significant interest may be ensuring fair and accurate proceedings that protect the public legitimacy of its system of detaining lawful permanent residents.[405] Although this interest is

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ACCOUNTING OFFICE, IMMIGRATION CONTROL: IMMIGRATION POLICIES AFFECT INS DETENTION EFFORTS, GAO/GGD-92-85, at 46 (1992)).

Appointed counsel would also increase the efficiency of removal proceedings by obviating the need for the court to advise *pro se* respondents. Markowitz, *supra* note 57, at 544–45.

402. BENSON & WHEELER, *supra* note 4, at 58; Markowitz, *supra* note 57, at 565. He would be more likely to be released, though, if DHS discontinued automatic stays of release upon their appeal. *See* Jorjani, *supra* note 151, at 120.

403. Unless he qualifies for discretionary relief (in some cases foreclosed by his conviction). *See supra* note 67.

404. BENSON & WHEELER, *supra* note 4, at 80–82. The ACUS report assessed the costs to the government of lack of representation as including "respondents' remaining in tax-supported detention based on unrealistic hopes." *Id.* at 58; *see also* Markowitz, *supra* note 57, at 545–46 (describing a drain on system by *pro se* respondents with no avenue for relief). The ACUS report proposed increasing use of stipulated removal orders, pursuant to which appointed counsel would provide important due process safeguards. BENSON & WHEELER, *supra* at 80–82; KOH ET AL., *supra* note 97, at 18–19.

405. *See* Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1799 (2001) (stating that the right to counsel is "crucial to the legitimacy of the justice system," especially where "crucial interests are at issue, legal standards are imprecise and subjective, proceedings are formal and adversarial, and resources between the parties are grossly imbalanced"); Stumpf, *supra* note 284, at 378 ("Excluding and alienating a population with strong ties to family, communities, and business interests in the United States fractures our society in ways that extend well beyond the immediate deportation or state-imposed criminal penalty."); *see also* Kaufman, *supra* note 14, at 145.

A counter-argument is available that noncitizens warrant less procedural rights on expressive grounds. *See* Judith Resnik, *Due Process: A Public Dimension*, 39 FLA. L. REV. 405 (1987) (noting that process has expressive value). Under this view, the lack of procedural safeguards provided to noncitizens—particularly, appointed counsel, which has taken on special meaning in American culture—expresses noncitizens' exclusion from membership in society. *Cf.* Dickerson v. United States, 530 U.S. 428, 430 (2000) ("[*Miranda*] warnings have become part of our national culture."); Stumpf, *supra* note 284, at 396–99. Here, I argue that the counter-values of legitimacy and transparency, especially in detention proceedings, outweigh these expressive values of exclusion. This is particularly true regarding LPRs, as the government has invited LPRs to this country and can expect they will build ties to work and family, who possess an interest in legitimate and transparent proceedings

unquantifiable, it should not be understated, since the Court has stated that a "purpose of procedural due process is to convey to the individual a feeling that the government has dealt with him fairly."[406] Our adversary system presupposes that "accurate and just results are most likely to be obtained through the equal contest of opposed interests."[407] When detention is at stake, the necessity for public legitimacy increases since "the power to detain human beings is one of the most awesome authorities exercised by a sovereign." Accordingly, "due process and *habeas corpus* are the *sine qua non* not only of all other rights, but of the very idea of limited government."[408]

The right to appointed counsel fits squarely within these maxims. Under *Gideon*, "the right to counsel does not serve to protect guilty defendants but to ensure equality and democracy for the rest of us."[409] Indeed, in detention cases, the right to counsel is not simply "procedure for procedure's sake" but a safeguard against potential "punishment-by-process."[410]

Moreover, in the preventive detention context, procedural safeguards such as appointed counsel help ensure that detention determinations do not "fall back on stereotypes and prejudices as proxies for dangerousness."[411] This is a particular risk regarding immigrants, who are commonly stereotyped as a "dangerous other."[412]

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as well. Juliet Stumpf, *Doing Time: Crimmigration Law and the Perils of Haste*, 58 UCLA L. REV. 1705, 1719–21 (2011) (noting that the natural consequence of admission is formation of community ties).

406. Carey v. Piphus, 435 U.S. 247, 262 (1978).

407. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 28 (1981).

408. Cole, *supra* note 17, at 706.

409. Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (finding right to counsel ensures that "every defendant stands equal before the law"); Victoria Nourse, Gideon's *Muted Trumpet*, 58 MD. L. REV. 1417, 1427, 1431 (1999) ("Can a citizen, stowed away in jail, believe that he is 'equal' before the law, when he cannot prove that the authorities are wrong?"); *see also* Demore v. Kim, 538 U.S. 510, 554 (2003) (Souter, J., dissenting) ("An opportunity to present one's meritorious grievances to a court supports the legitimacy and public acceptance of a statutory regime.") (quoting Kenyeres v. Ashcroft, 538 U.S. 1301, 1305 (2003)).

410. Nourse, *supra* note 409, at 1418; Stumpf, *supra* note 92, (manuscript at 11).

411. Cole, *supra* note 17, at 696; Judth Resnik, *Detention, the War on Terror, and the Federal Courts: An Essay in Honor of Henry Mohaghan*, 110 COLUM. L. REV. 579, 663 (2010); Hamdi v. Rumsfeld, 542 U.S. 507, 530–31 (2004) ("[A]n unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat.").

412. *See* Joseph Margulies, *Deviance, Risk, And Law: Reflections On The Demand For The Preventive Detention Of Suspected Terrorists*, 101 J. CRIM. L. & CRIMINOLOGY 729, 731 (2011) (citing DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 184 (2001)); Resnik, *supra* note 411, at 663 (noting common arguments used to justify detention with little oversight include "the characteristics of a specific set of detainees—that they are alleged terrorists, postconviction prisoners, or migrants entering without permission").

IV. PROVIDING THE RIGHT: PROPOSED CHANGES AND EVALUATING ALTERNATIVES

Since the *Mathews* analysis in Part III indicates a need for appointed counsel, Part IV sets out proposed changes in the regulations to provide for appointed counsel before the *Joseph* hearing. I propose an Immigrant Detention Defender Corps, and posit whether unbundled *Joseph* representation might suffice. Lastly, I evaluate alternatives short of full representation—i.e., non-lawyer assistance or neutral notice or screening processes—and argue that the legal, procedural, and factual complexity of the *Joseph* detention hearing requires a lawyer's advocacy skills.

A. *Appointed Counsel for Mandatory Detainees at a Prompt* Joseph *Hearing With Adequate Notice*

I propose that upon DHS' determination to mandatorily detain, indigent detainees be appointed counsel at government expense with reasonable time to prepare for their *Joseph* hearing. Notably, counsel would not likely be constitutionally required at the detention determination, but rather within a reasonable time of the detention determination, with enough time to prepare for the *Joseph* hearing.[413]

Concomitantly, DHS should promulgate regulations governing the *Joseph* hearing process, which provide (1) adequate notice of the right to a *Joseph* hearing—i.e., revision of the Form I-286,[414] (2) a *Joseph* hearing within a specified reasonable time (e.g., thirty to sixty days),[415] and (3) codification of the detainee's right to produce and test evidence. These safeguards would rectify additional procedural deficiencies that affect the detainee's liberty, counsel or not.

Further, DHS should promulgate regulations that make the *Joseph* detention hearing potentially dispositive, to encourage early resolution of deportation proceedings. If the *Joseph* hearing had dispositive potential—i.e., if a successful hearing for the immigrant could result in dismissal—both the immigrant's counsel and government counsel would be incentivized to produce witnesses and evidence and resolve the ultimate issues early. Today, the low burdens give government counsel little incentive to produce evidence, leading to continuances and further detention at government cost.

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413. *Cf.* Rothgery v. Gillespie Cty., 554 U.S. 191, 218 (2008) (Alito, J., concurring) ("[C]ounsel must be appointed within a reasonable time after attachment *to allow for adequate representation at any critical stage before trial, as well as at trial itself.*") (emphasis in original).

414. *See* Markowitz, *supra* note 57, at 566.

415. *See, e.g.*, N.Y. MENTAL HYG. LAW § 10.06(g) (2008) (providing for probable cause hearing as to sex offender commitment within 30 days, followed by jury trial); MINN. STAT § 253B.08 (2005) (requiring trial within 90 days of petition for commitment).

B. *Policy Impacts: Who Represents Detained Immigrants For How Long?*

This section addresses the practical concerns of whom might represent detainees and for how long. Although this Article will not delve into comprehensive doctrinal analysis of these policy proposals, I hope to frame the debate for future scholarship.

1. "Unbundled" Representation at the *Joseph* Hearing: Constitutionality, Ethics, and Practicality

"Unbundled," or "limited scope," representation by counsel only at the *Joseph* hearing—and not in the underlying deportation proceedings—would generally constitutionally satisfy the due process arguments made here. That said, I argue that counsel could exit after the *Joseph* hearing only if DHS changed current procedures to eliminate the continued detention of those with substantial claims challenging detention.

Unbundled legal representation includes, most pertinent here, representation by the lawyer of a client for only a portion of her case, without rendering full service.[416] In 2002, the American Bar Association updated its Model Rule 1.2(c) to allow unbundled representation "if the limitation is reasonable under the circumstances and the client gives informed consent."[417] Forty-one states have adopted the new Model Rule or similar provisions.[418] Unbundled representation is currently employed in various contexts to assist low-income clients such as family law,[419] housing law,[420] or bankruptcy.[421] The ABA endorsed unbundled representation in bankruptcy for its positive "ripple effect" on later legal action by the parties.[422]

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416. *See generally* AMERICAN BAR ASS'N, HANDBOOK ON LIMITED SCOPE ASSISTANCE: A REPORT OF THE MODEST MEANS TASK FORCE, 30–34 (2003).

417. MODEL RULES OF PROF'L CONDUCT R.1.2(c) (2002).

418. AMERICAN BAR ASSOCIATION, UNBUNDLING FACT SHEET (2011), *available at* http://www.americanbar.org/content/dam/aba/migrated/legalservices/delivery/downloads/20110331_unbundling_fact_sheet.authcheckdam.pdf.

419. AMERICAN BAR ASS'N, *supra* note 416, at 34–35; *see also* Richard Zorza, *Discrete Task Representation, Ethics, and the Big Picture: Toward A New Jurisprudence*, 40 FAM. CT. REV. 19 (2002).

420. Brenda Star Adams, *"Unbundled Legal Services": A Solution to the Problems Caused by* Pro Se *Litigation in Massachusetts Civil Courts*, 40 NEW ENG. L. REV. 303, 316–18 (2005).

421. ABA HANDBOOK, *supra* note 416, at 34–35; *see also* David S. Kennedy & Vanessa A. Lantin, *Maintaining the Professionalism and Competence of a Lawyer in Bankruptcy Litigation When Compensation Becomes a Problem and Related Matters*, 13 J. BANKR. L. & PRAC. 1 (2004).

422. ABA HANDBOOK, *supra* note 416, at 34–35. For example, if a lawyer represents a client during a creditors' meeting, often relief is granted after that meeting and the client can subsequently proceed *pro se*. *Id. But see* Kennedy & Lantin, *supra* note 421, at 12 (concerns that litigation problems between creditors and client often arise after creditors' meeting).

Although statistics are incomplete,[423] evidence exists that unbundled representation results in higher success than no representation at all. For example, in a Massachusetts landlord/tenant "lawyer for a day" program, between 28 percent and 56 percent of those with limited representation retained their residences as compared to 12.5 to 15.8 percent of unrepresented litigants.[424]

The constitutionality of unbundled representation is novel, since immigration proceedings are unique. Nothing in the Constitution appears to prohibit unbundled representation. In the criminal field, perhaps the closest procedural analog, the pre-*Gideon* academics and advocates apparently assumed that representation would start at the bail hearing and continue through trial.[425] Unbundled *Joseph* representation might reduce government costs under the third *Mathews* factor, but conversely reduce the risk of erroneous deprivation at the *Joseph* hearing under the second factor.[426]

Allowing limited *Joseph* representation would likely provide great help to mandatory immigration detainees. It would increase the chances of successful pretrial release, as demonstrated by a pilot for unbundled representation at criminal bail hearings.[427] It would have a significant "ripple" effect on the underlying proceedings. Indeed, in most cases where the detention and deportation grounds are the same, there would—or should—be little left to litigate after the *Joseph* hearing.

Unbundled representation would also remove a barrier that discourages many pro bono organizations from assisting detainees, as organizations fear litigating proceedings after the bond hearing if the case is transferred to a far-flung state.[428] While immigration court local rules currently prohibit unbundled representation, pilot programs for unbundled representation have been initiated.[429] In New York, the Immigration Court waived its rules to provide limited representation at bond hearings or master calendar hearings.[430]

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423. Jessica K. Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 GEO. J. ON POVERTY L. & POL'Y 453, 474–75 (2011).

424. Adams, *supra* note 420, at 318.

425. *See supra* notes 399–400, 411–15. For example, when those academics and advocates emphasized the early initial interview with counsel, it does not appear they envisioned a later interview with separate "trial" counsel. Beaney, *supra* note 296, at 780–81.

426. Michael Millemann, *The State Due Process Justification for a Right to Counsel in Some Civil Cases*, 15 TEMP. POL. & CIV. RTS. L. REV. 733, 738 (2006).

427. *See* Colbert et al., *supra* note 399, at 1720 ("[T]wo and one half times as many represented defendants were released on recognizance from pretrial custody as were unrepresented defendants."). The study did not track results at trial.

428. Markowitz, *supra* note 57, at 562; NYIRS, *supra* note 6, at 404.

429. *See* DEP'T OF JUSTICE, *supra* note 123, at 2.3(d).

430. Immigration Court Observation Project, *Unbundled Representation in New York City Immigration Courts*, IMMIGRATION COURT OBSERVATION PROJECT (Oct. 19, 2011),

There are some caveats. Immigration proceedings are complicated and intricate, and ethics rules would require meaningful consent of the client to limited representation.[431] Moreover, since any right to "unbundled" counsel creates claims for ineffective assistance, even unbundled counsel must have sufficient time to investigate the facts. This is especially important at *Joseph* hearings, where the client may not possess all the facts or know which facts support his claims.

Given the current high *Joseph* burden and automatic stay procedures, however, unbundled representation would leave detainees with valid claims abandoned after the *Joseph* hearing. Immigrants would then be forced to litigate deportation proceedings *pro se* and detained.[432] Such a situation implicates the same fundamental fairness at trial that appointed counsel should constitutionally protect. That said, if the *Joseph* burden was shifted, the automatic stay repealed, and the immigrant given a chance to win at the *Joseph* hearing without further proceedings, *Joseph* counsel might be constitutionally sufficient.

At bottom, if unbundled representation was constitutionally provided at a *Joseph* hearing, it would be practically and ethically difficult to take it away so long as the deportation case continued with the immigrant detained.

2. The Composition of the Immigrant Detention Defender Corps

This Article advocates for a national corps of capable detention-challenge and ideally removal-defense litigators—what I call the Immigrant Detention Defender Corps.[433] Different funding mechanisms could be used to fulfill the constitutional duty to provide counsel.[434] For example, federal

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http://nycicop.wordpress.com/2011/10/19/unbundled-representation-in-new-york-city-immigration-courts/; *see* Markowitz, *supra* note 57, at 562.

431. Kennedy & Lantin, *supra* note 421, at 12–14.

432. One solution is that "*Joseph* counsel" could stay in the case through *Joseph* appeals; yet, since the deportation proceeds apace, trial rights would still be implicated unless "*Joseph* counsel" was also "deportation counsel." This all presumes that the detention and deportation grounds are the same, and the Government would drop the case and not lodge another mandatory detention or deportation ground.

433. As this Article went to print, the New York Immigrant Representation Study Group (NYIRS), *see supra* note 6, released Part II of its report, which proposed the first publicly-funded "Deportation Defense Project" to provide universal representation to immigrants in removal proceedings, regardless of the merit of their claims. *See* STUDY GRP. ON IMMIGRANT REPRESENTATION, NEW YORK IMMIGRANT REPRESENTATION STUDY, ACCESSING JUSTICE II: A MODEL FOR PROVIDING COUNSEL TO NEW YORK IMMIGRANTS IN REMOVAL PROCEEDINGS (2012) [hereinafter NYIRS II], *available at* http://www.cardozolawreview.com/content/denovo/NYIRS_ReportII.pdf. The report proposed to begin with immigrant detainees, as detainees face the most barriers, for many of the reasons set forth in this article. *See id.* at 15–17.

434. *See* Worden et al., *supra* note 288, at 1437.

sex offender civil commitment provides appointed counsel pursuant to the procedures for indigent federal criminal defendants.[435]

Ultimately, state criminal defenders, now required under *Padilla* to advise clients on the immigration consequences of criminal dispositions, may be the most logical candidates for such a corps. They are currently required to learn the same immigration impact of a criminal conviction that could be litigated in a *Joseph* hearing.[436] Moreover, the continuity of counsel from criminal proceedings to immigration proceedings will be key to success.[437] Indeed, state criminal counsel now routinely address factual issues with an eye towards their immigration impact.[438] As the factual inquiry at a *Joseph* hearing expands to relitigate the facts of conviction, state criminal counsel would be best positioned to litigate those same factual issues in immigration court.[439]

Funding, of course, is the crucial problem.[440] Practically, such a plan could be funded by a novel federal-state partnership to deputize state criminal defenders as federal immigration counsel, at least for a *Joseph* hearing. One model is current federal-state prosecutorial enforcement cooperation, such as Secure Communities and INA § 287(g). Of course, this would raise difficult bureaucratic and political issues (but, notably, not legal issues) beyond the scope of this Article.

3. Non-Lawyer Representation (Accredited Representatives)

Another solution may be to provide non-lawyer representation. However, I do not believe that this would be sufficient to meet due process requirements. *Joseph* hearings require analysis, advocacy, and advice—skills squarely within the province of lawyers. DHS regulations currently provide for "accredited representatives" and "reputable individuals" to represent

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435. 18 U.S.C. § 4247(d) (2006) (citing 18 U.S.C. § 3006A (2006)).

436. Padilla v. Kentucky, 130 S. Ct. 1473, 1488–90 (2010) (Alito, J., concurring).

437. *See* Mark Noferi, *Rutgers Webcam Case Underscores Uneven Treatment of Immigrants*, 209 N.J.L.J. 127–28 (2012) (noting that Dharun Ravi's criminal lawyers preemptively convinced ICE not to initiate deportation proceedings).

438. *See supra* note 199.

439. *See supra* notes 226–34, 244–45. This would of course be in situations where the immigration court hearing occurs in the state where criminal counsel is located, which would necessitate restrictions on ICE transfer policies.

440. Kim Taylor-Thompson, *Looking Backward: Tuning Up* Gideon's *Trumpet*, 71 FORDHAM L. REV. 1461 (2003) (describing unfunded mandate after *Gideon*). Nothing legally prohibits a criminal lawyer (public or private) from continuing to represent a client in immigration court. Along these lines, forward-thinking defender offices have begun to embrace a "holistic" model that addresses the broader needs of individual clients beyond the termination of a criminal case. *Id.* at 1497–1500, 1504–06. Some had begun to employ in-house immigration experts, even before *Padilla*. Ronald F. Wright, Padilla *and the Delivery of Integrated Criminal Defense*, 58 UCLA L. REV. 1515, 1533–34 (2011). That said, additional representational responsibilities of course require additional funding.

immigrants,[441] and the ABA has supported this approach.[442] The rationale is simple: a non-lawyer is "better than no lawyer at all."[443] Yet as Isabel Medina recently argued, non-lawyers' lack of adversarial expertise may be "more likely to exacerbate the problem" in deportation proceedings "than to solve it."[444]

The Court noted that something less than full representation, such as a "neutral social worker," might suffice to meet due process requirements even in civil contempt proceedings leading to incarceration in *Turner v. Rogers*.[445] The *Turner* Court cited *Vitek v. Jones*, in which the fifth concurring vote found that the assistance of a mental health professional was sufficient to litigate a medical issue.[446]

At a *Joseph* hearing, however, there is significant need for the type of skills that a lawyer, and only a lawyer, can provide. Unlike *Turner*, which involved the filling out of a financial form,[447] *Joseph* hearing issues are legally, procedurally, and factually complex. These issues are litigated against government counsel with months or years of incarceration at stake.[448] Specifically, the ability to collect, present, and test evidence has always been at the heart of the *Gideon* right to counsel.[449] Moreover, as a policy matter, the official sanctioning of non-lawyers to practice law opens up the possibility for widespread abuse. Few safeguards exist to monitor non-lawyers acting as counsel.[450]

C. *Evaluating Alternative Procedural Safeguards*

Lastly, it is doubtful that "alternative procedural safeguards" could suffice for immigrant detainees. For example, the *Turner* Court held that neutral procedures such as notice, opportunity to respond, and a hearing

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441. 8 C.F.R. § 1292.1 (2011).

442. RESOLUTION 118, AMERICAN BAR ASSOCIATION COMMISSION ON IMMIGRATION REPORT TO THE HOUSE OF DELEGATES 6–7 (2011) (adopted report and resolution to improve access to counsel in immigration removal proceedings), *available at* http://www.americanbar.org/content/dam/aba/directories/policy/2011_am_118.authcheckdam.pdf.

443. M. Isabel Medina, *The Challenges of Facilitating Effective Legal Defense in Deportation Proceedings: Allowing Nonlawyer Practice of Law Through Accredited Representatives in Removals*, 53 S. TEX. L. REV. (forthcoming 2012) (manuscript at 4), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2000979.

444. *Id.* (manuscript at 2).

445. Turner v. Rogers, 131 S. Ct. 2507, 2519 (2011); *see also* Laura Abel, Turner v. Rogers *and the Right of Meaningful Access to the Courts*, DENVER L. REV. (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2000960.

446. Vitek v. Jones, 445 U.S. 480, 499–500 (1980) (Powell, J. concurring).

447. *Turner*, 131 S. Ct. at 2519.

448. *See supra* Section I.A.2. Unlike *Vitek*, the issues are not medical.

449. Medina, *supra* note 443 (manuscript at 10–11).

450. Medina, *supra* note 443 (manuscript at 5).

on the record might constitute due process for the "straightforward" factual determination of indigence.[451] That said, it is hard to say that notice and a hearing on the record would even the scales at a complex adversarial hearing against government counsel. Perhaps the strongest argument against the sufficiency of neutral procedures is that Immigration Court judges are already duty-bound to provide extra notice and advice to *pro se* respondents,[452] and the disparity in outcomes between represented and unrepresented litigants remains stark.

Additionally, some courts and academics have argued that as a matter of due process, detainees with "substantial" arguments at a *Joseph* hearing should not be subject to lengthy detention.[453] One option would be a neutral screening mechanism to appoint counsel to those with substantial claims against the detention decision.[454] Yet as *Hamdi* counseled, the right to procedural due process "does not depend upon the merits of a claimant's substantive assertions."[455] Moreover, in complicated immigration cases, as Michael Kaufman argued, "[I]t takes an attorney to identify the sorts of complex constitutional or statutory claims that only an attorney can 'adequately' present."[456] Given the complexity, it is unlikely an attorney could identify all valid claims in an initial screening interview, since the detained immigrant may not know the facts supporting them. Essentially, such an approach would echo the *Betts v. Brady* case-by-case right to appointed counsel, which has turned out, in both criminal and immigration law, to be "no right at all."

CONCLUSION

In sum, I argue that a "detention-and-deportation *Gideon*" should replace the current case-by-case approach for mandatory pre-hearing immigration detainees, as *Gideon* replaced *Betts v. Brady*. The mandatory detention process as it stands now is a recipe for wrongful detention and deportations. Widespread academic criticism predated *Gideon*, and I hope

451. *Turner*, 131 S. Ct. at 2519–20.

452. 8 C.F.R. § 1240.11 (2009); *see also* 2 UNITED STATES OFFICE OF THE CHIEF IMMIGRATION JUDGE, IMMIGRATION JUDGE BENCHBOOK 542–43 (4th ed. 2001) [hereinafter BENCHBOOK].

453. *See, e.g.*, Tijani v. Willis, 430 F.3d 1241, 1246 (9th Cir. 2005) (Tashima, J., concurring); Bradley B. Banias, *A "Substantial Argument" Against Prolonged, Pre-Removal Mandatory Detention*, 11 RUTG. RACE & L. REV. 31 (2009).

454. Markowitz, *supra* note 15, at 1358–60 (noting that for non-criminal aliens, an impartial screening to determine eligibility for relief may suffice). Immigration judges have expressed discomfort, however, at "screening cases and recruiting pro bono counsel." Markowitz, *supra* note 57, at 561.

455. Hamdi v. Rumsfeld, 542 U.S. 507, 530 (2004) (citing Carey v. Piphus, 435 U.S. 247, 259 (1978)).

456. Kaufman, *supra* note 14, at 137; *see also* NYIRS REPORT PART II, supra note 433 (noting that neutral screening procedures are insufficient)..

that this Article will spur courts to an analogous result.[457] Moreover, a constitutional right to counsel for the limited subclass of mandatory pre-hearing detainees may as a practical matter lead to a broader right generally in immigration proceedings.[458]

Practically, however, the impact of appointed counsel at a *Joseph* hearing may be blunted until DHS fixes other procedural deficiencies. As things stand, two other DHS practices—the high burden at a *Joseph* hearing and DHS' practice of automatically staying release upon their appeal—keep immigrants detained who have valid claims against detention and deportation. Thus, even if appointed counsel were provided to detainees, counsel might choose to strategically forego a *Joseph* hearing, given the low chance of winning and time and expense to gather witnesses who will have to appear at the deportation hearing in any event.[459]

This Article focuses narrowly on the issue of appointed counsel. But I agree with other scholars who argue these practices are unconstitutional, as they reverse the usual presumption against detention.[460] And, as stated earlier, from a constitutional standpoint, it would be circular, if not perni-

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457. *See* Laura K. Abel, *A Right to Counsel in Civil Cases: Lessons From* Gideon v. Wainwright, 15 TEMP. POL. & CIV. RTS. L. REV. 527, 531 (2006).

458. Russell Engler, *Reflections on a Civil Right to Counsel and Drawing Lines: When Does Access to Justice Mean Full Representation By Counsel, and When Might Less Assistance Suffice?*, 9 SEATTLE J. FOR SOC. JUST. 97 (2010) (identifying "likely starting points in an incremental strategy" for expansion of right to counsel).

459. In practice, *Joseph* hearings appear rare today. It may be for these strategic reasons, or that many pretrial immigration detainees do not request a *Joseph* hearing because without counsel they do not know it exists. Another plausible explanation is that counseled immigrants choose instead to file a motion to terminate proceedings, thus challenging deportability rather than mandatory detention. *See* BENCHBOOK, *supra* note 452, at 605 ("The alien may request termination on grounds such as: the [Order To Show Cause] is defective, e.g., not signed; incongruity between charge and allegations; the INS has not met its burden of proof . . . ."). Usually, as previously mentioned, the issue of deportability and mandatory detention is the same. *See supra* note 135. Additionally, a motion to terminate does not have the same high burden as a *Joseph* motion. *See supra* note 133. That said, termination is generally without prejudice to DHS to file the same charge or a new charge at a later time. BENCHBOOK, *supra* note 452, at 606.

If a right to counsel at a Joseph hearing was found, it would make the most practical sense for DHS to consolidate its termination and Joseph motion procedures—essentially, to make that hearing dispositive, as I argue above. *See supra* Section IV.A. In any case, all this would still be difficult for a detained *pro se* immigrant to navigate, even if he knew these procedures exist.

460. Bhargava, *supra* note 122, at 67 (arguing that the burden should match other preventive detention statutes requiring at least "clear and convincing evidence"); Sayed, *supra* note 17, at 1856; *see* 18 U.S.C. § 3142(f)(2)(B) (2006) (denial of bail must be supported by "clear and convincing" evidence); 18 U.S.C. § 4248(d) (2006) (finding that person is sexually dangerous similarly requires "clear and convincing" evidence"); *see also* Jorjani, *supra* note 151, at 120–22 (arguing automatic stay provisions are unconstitutional); Complaint, Gayle v. Napolitano, No. 3:12-cv-806(D.N.J. Nov. 16, 2012), *available at* http:///www.aclu.org/files/assets/gayle_v._napolitano_-_amended_complaint_-_final.pdf (federal class-action challenging the *Joseph* burden).

cious, to hold certain procedural deficiencies adequate because others are not.

Looking forward, the question of widespread preventive immigration detention may be as much moral as constitutional.[461] It may involve a "national look in the mirror" to ask "is this what America does?"[462] So long as the U.S. detains pending deportees in large numbers, however, the system can at least provide transparent proceedings and a fair chance to those caught in it, and help ensure that lawful residents are not wrongfully detained and deported.

461. Cole, *supra* note 17, at 696.

462. William Glaberson, *President's Detention Plan Tests Legal Tradition*, N.Y. TIMES, May 22, 2009, http://www.nytimes.com/2009/05/23/us/politics/23detain.html?_r=0. In future research, I plan to articulate the limits of procedural due process to justify preventive detention.